Bacom Enterprises Sdn Bhd v Jong Chuk & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02–826 OF 1998, Q-02–827 OF 1998, Q-02–828 OF 1998 AND Q-02–367 OF 1999
MOHD GHAZALI, LOW HOP BING AND SURIYADI JJCA
14 APRIL 2011

Contract — Breach — Development agreement — First to fifth defendants (defendants) entered into development agreement with plaintiff to develop land they owned — Subject land sold to third party (Bacom) — Plaintiff claimed breach of development agreement — High Court held that sale and purchase agreement was void and Bacom liable for damages to plaintiff — Appeal against decision — Whether defendants in breach of development agreement — Whether plaintiff aware of sale and thus estopped from claiming against defendants — Whether Bacom bound by development agreement — Whether Bacom wrongfully induced defendants to breach development agreement — Whether there were errors of law and manifest appreciation of facts by trial judge

Contract — Privity — Development agreement — Whether Bacom party to development agreement — Whether plaintiff had direct claim against Bacom — Sale and purchase agreement — Whether plaintiff party to SPA — Whether plaintiff could rely on SPA if it contained provision which was intended to benefit him

Tort — Inducement of breach of contract — Whether Bacom wrongfully induced defendants to breach development agreement — Whether Bacom falsely and/or fraudulently represented to defendants that it would abide by development agreement — Whether trial judge erred in ruling that fraud could be proved on balance of probabilities

Chong Tung Sang and five others ('the first to the fifth defendants') were at all material times the registered co-proprietors of a piece of land situated in Kuching ('the land'). On 22 October 1991, they entered into a development agreement ('the DA') with Jong Chuk ('the plaintiff'), a developer. Three months after the execution of the DA, the first to the fifth defendants granted the plaintiff the power of attorney (the first PA') to do certain acts such as appearing before all relevant authorities in respect of the land and to submit all requisite plans for the development of the land. The plaintiff lodged a caveat to protect his interest in the land but about 20 days later withdrew this caveat. On 25 May 1993, the first to the fifth defendants entered into a sale and purchase

agreement ('the SPA') to sell the land to Bacom Enterprises Sdn Bhd ('Bacom') for RM1.2m and simultaneously revoked the first PA. According to the recitals to the SPA, Bacom as the purchaser was fully aware of and understood all the terms of the DA and the first PA. Consequently, Bacom as the new registered proprietor of the land granted the plaintiff a power of attorney ('the second PA') that was identical to the first PA. Thereafter, Bacom requested from the plaintiff a full and accurate progress report with regard to the development of the land. However the plaintiff failed to co-operate and the relationship between the plaintiff and Bacom deteriorated. Bacom then revoked the second PA that it had granted to the plaintiff and informed the Kuching Rural District Council ('the KRDC') that the plaintiff no longer had the power of attorney to proceed with any works on the land. The plaintiff then commenced the present civil suit against the first to the fifth defendants for breach of the DA. By way of this action the plaintiff sought, inter alia, a declaration against the first to the fifth defendants that the revocation of the first PA and the sale of the land by them to Bacom was a breach of the DA and claimed damages. The first to the fifth defendants' defence in answer to the plaintiff's claim was that there was no breach of the DA as they had a right to sell the land premised upon cl 22 of the DA and further that the plaintiff was aware and had agreed to the transfer of the land. Bacom then became a party to the suit as a consequent of the third party proceedings at the behest of the first to the fifth defendants. In the third party proceedings, the first to the fifth defendants averred that the sale of the land was made with the knowledge and consent of the plaintiff and that if in any event they were found liable to the plaintiff they were entitled to a full indemnity against Bacom. When Bacom was made a party, the plaintiff found it appropriate to make a direct claim against Bacom for specific performance of the DA or in the alternative damages for breach of the same and for damages for wrongfully inducing the first to the fifth defendants to breach the DA, ie a claim in tort. In response Bacom denied the plaintiff's claim on the premise that there was a lack of privity and denied the tortuous allegations. Bacom also counterclaimed against the plaintiff for the loss and damage it had suffered as a result of the caveat lodged by the plaintiff on the land. However after closing their case the first to the fifth defendants filed an application to amend their statement of claim against Bacom in the third party action. The amendments made by the first to the fifth defendants were that Bacom had fraudulently and falsely represented that it would be bound by the terms and conditions of the DA knowing the same to be untrue; that the SPA which was procured by the fraud of Bacom was null and void and that the land should revert back to them. The plaintiff also applied to amend his statement of claim in the main action. The plaintiff's amendments were to the effect that Bacom falsely and/or fraudulently represented to the first to the fifth defendants that it would abide by the DA when it had never had any real intention to do so as it had a separate plan to develop the land into a water/family theme park. As a result of these amendments to the pleadings Bacom filed a motion to recall certain witnesses but the trial judge dismissed Bacom's motion on the grounds that the agreed

issues to be tried remained the same despite the amendments to the pleadings. Bacom appealed against this decision (the first interlocutory appeal). At the same time the plaintiff had applied to expunge certain statements from the affidavit of Bacom's representative on the grounds that the statements in that affidavit related to the financial standing of the plaintiff. The trial judge allowed the application to expunge and hence the second interlocutory appeal ('the second interlocutory appeal'). Bacom made an oral application to call three expert witnesses, two architects and a surveyor, but the plaintiff objected. This application was dismissed on the grounds that there was need for further opinion evidence of experts when there was ample evidence for determining the liabilities of each party. Hence the third interlocutory appeal. At the close of the main hearing the trial judge of the High Court found that the first to the fifth defendants were entitled to sell the land to Bacom without the knowledge or consent of the plaintiff and were not liable to the plaintiff for any loss or damages. However, he found that Bacom had no intention to be bound by the DA when it signed the SPA and that its intention and conduct were fraudulent within the ambit of s 17(c) and (d) of the Contracts Act 1950 and as such, Bacom was found guilty of civil fraud. Thus the High Court held that the SPA was null and void and ought to be set aside; that the land was to be re-transferred by Bacom to the first to the fifth defendants after the latter had refunded the full purchase price to Bacom; that the first to the fifth defendants were to re-execute the first PA in favour of the plaintiff; that Bacom was to pay damages for breach of the DA and for fraud to the plaintiff and to the first to the fifth defendants; and that Bacom's counterclaim against the plaintiff was dismissed. This was Bacom's appeal against that judgment. This appeal and the three other interlocutory appeals came before this court and the parties agreed to proceed with the appeal against the final judgment of the High Court in the main action.

Held, allowing the appeal against the main action with costs to be paid by the plaintiff to the first to the fifth defendants and Bacom:

(1) Premised upon the pleadings of the plaintiff and the first to the fifth defendants prior to the amendments, this court agreed with the finding of the trial judge that the first to the fifth defendants as original landowners were not in breach of the DA when they entered into the SPA. Since the first to the fifth defendants were not liable to the plaintiff for any loss, damages or costs, it would follow that the third party proceedings against Bacom would also have to be dismissed. That being the case, the plaintiff's direct claim against Bacom would suffer the same fate on the doctrine of privity as Bacom was not a party to the DA. The fact that Bacom had agreed with the first to the fifth defendants that it was bound by the terms of the DA was a matter between the two parties and could not confer contractual privity between the plaintiff and Bacom. It was thus found that the trial judge could not have made an

order that the SPA and the respective memorandum of transfers be set aside and consequently order specific performance of the DA against the first to the fifth defendants (see paras 100–102 & 132(d), (e)).

(2) The plaintiff's claim against Bacom for wrongfully inducing the first to the fifth defendants to breach the DA, ie the claim in tort, would also not be able to stand. On the issue of fraud the plaintiff had not adduced any evidence to show that Bacom had acted dishonestly towards him when it purchased the land. It was settled law that the burden of proof in tort was in line with the doctrine of privity. The plaintiff was not a party to the SPA and thus could not enforce it. There being no evidence of deceit practised on the plaintiff by Bacom, the claim in tort by the plaintiff against Bacom could not stand. The trial judge had erred in ruling that fraud could be proved on a balance of probabilities (see paras 103,113–115 & 133).

(3) The amendments to the pleadings made by the plaintiff and the first to the fifth defendants confounded this suit, because these amendments turned in an opposite direction of the earlier position taken by them. However, the trial judge ruled that the statement of agreed facts and issues remained the same. This ruling by the trial judge denoted that he had misappreciated the points in controversy after he allowed the amendments. There was a flaw in the conclusion of facts and on the law reached by the trial judge, viz, fraud was not an agreed issue to be tried. In the instant case, Bacom had entered into the SPA with the first to the fifth defendants and the plaintiff was not a party to this agreement. Thus, if at all Bacom was dishonest and had practised deceit when it entered into the SPA, the affected persons would be the first to the fifth defendants (see paras 104–107, 120, 125, 126 & 135).

(4) Although the plaintiff's submission that Bacom entered in to the SPA for the purpose of developing a theme/water park found favour with the trial judge, this court found that there was no evidence to show that Bacom had pursued the matter of converting the land for commercial use (see para 117).

(5) Based on the evidence adduced it was clear that at the material time the works to be carried out by the plaintiff as developer had yet to commence. In fact the plaintiff had yet to submit to the KRDC the notice for the commencement of the engineering works. In the circumstances of this case, Bacom was justified in revoking the second PA and consequently in requesting the plaintiff to vacate the land. Bacom should also succeed in its counterclaim and would be entitled to damages to be assessed by the senior assistant registrar (see paras 132(f) & 134).

(6) The three interlocutory appeals would abate. They were academic in view of the decision in the main appeal. As these three appeals had not been adjudicated upon, there was no issue of costs for them (see para 127–132 & 136).

[Bahasa Malaysia summary

Chong Tung Sang dan lima lagi (defendan-defendan pertama hingga kelima) adalah pada setiap masa matan pemilik tunggal bersama yang berdaftar ke atas sebidang tanah terletak di Kuching ('tanah tersebut'). Pada 22 Oktober 1991, mereka telah memasuki perjanjian pembangunan ('PP') dengan Jong Chuk ('plaintif'), pemaju. Tiga bulan selepas PP disempurnakan, defendan-defendan pertama hingga kelima telah memberikan surat kuasa wakil ('SKW pertama') untuk melakukan tindakan tertentu seperi hadir di hadapan semua pihak berkuasa yang relevan berkaitan tanah tersebut dan mengemukakan semua perancangan yang perlu untuk pembangunan tanah tersebut. Plaintif telah memasukkan kaveat untuk melindungi kepentingannya dalam tanah tersebut tetapi lebih kurang 20 hari kemudian telah menarik balik kaveat ini. Pada 25 Mei 1993, defendan-defendan pertama hingga kelima telah memasuki perjanjian jual beli ('PJB') untuk menjual tanah tersebut kepada Bacom Enterprises Sdn Bhd untuk RM1.2 juta dan pada masa yang sama membatalkan SKW pertama. Menurut perihal PJB, Bacom sebagai pembeli sedar dan memahami semua terma-terma PP dan SKW pertama. Berikutan itu, Bacom sebagai pemilik berdaftar baru tanah tersebut telah memberikan plaintif surat wakil kuasa ('SWK kedua') yang sama dengan SWK pertama. Selepas itu, Bacom meminta daripada plaintif laporan prestasi yang penuh dan tepat berkaitan pembangunan tanah tersebut. Walau bagaimanapun, plaintif telah gagal bekerjasama dan hubungan antara plaintif dan Bacom terjejas. Bacom kemudian telah membatalkan SWK kedua yang telah diberikannya kepada plaintif dan memberitahu Majlis Daerah Luar Bandar Kuching ('MDLBK') bahawa plaintif mempunyai surat wakil kuasa untuk meneruskan apa-apa kerja atas tanah tersebut. Plaintif kemudian telah memulakan guaman sivil ini terhadap defendan-defendan pertama hingga kelima kerana melanggar PP. Melalui tindakan ini plaintif memohon, antara lain, deklarasi terhadap defendan-defendan pertama hingga kelima bahawa pembatalan SWK pertama dan jualan tanah tersebut oleh mereka kepada Bacom merupakan pelanggaran PP dan menuntut ganti rugi. Pembelaan jawapan defendan-defendan pertama hingga kelima terhadap tuntutan plaintif adalah bahawa tiada pelanggaran PP kerana mereka mempunyai hak untuk menjual tanah tersebut berlandaskan fasal 22 PP dan selanjutnya bahawa plaintif sedar dan telah bersetuju untuk memindah milik tanah tersebut. Bacom kemudian telah menjadi pihak guaman tersebut akibat daripada prosiding pihak ketiga atas perintah defendan-defendan pertama hingga kelima. Dalam prosiding pihak ketiga, defendan-defendan pertama hingga kelima menegaskan bahawa jualan tanah tersebut telah dibuat dengan pengetahuan dan persetujuan plaintif dan bahawa dalam apa keadaan mereka didapati bertanggungjawab terhadap plaintif maka

mereka berhak mendapat indemniti terhadap Bacom. Apabila Bacom dijadikan pihak, plaintif mendapati ia sesuai untuk membuat tuntutan secara langsung terhadap Bacom untuk pelaksanaan spesifik PP atau alternatifnya ganti rugi kerana pelanggaran yang sama dan untuk ganti rugi kerana pelanggaran PP, iaitu tuntutan dalam undang-undang tort. Sebagai jawapan Bacom menafikan tuntutan plaintif berlandaskan bahawa priviti tidak mencukupi dan menafikan dakwaan bersifat tort tersebut. Bacom juga menuntut balas terhadap plaintif untuk kehilangan dan kerugian yang dialaminya akibat kaveat yang dimasukkan oleh plaintif atas tanah tersebut. Walau bagaimanapun selepas menutup kes mereka defendan-defendan pertama hingga kelima telah memfailkan permohonan untuk meminda penyataan tuntutan terhadap Bacom dalam tindakan pihak ketiga. Pindaan-pindaan yang dibuat oleh defendan-defendan pertama hingga kelima adalah bahawa Bacom secara fraud dan palsu telah mengemukakan yang ia terikat dengan terma-terma dan syarat-syarat PP meskipun mengetahui yang sama adalah tidak benar; bahawa PJB yang dibuat secara fraud oleh Bacom adalah terbatal dan tak sah dan bahawa tanah tersebut patut dikembalikan kepada mereka. Plaintif juga memohon untuk meminda penyataan tuntutannya dalam tindakan utama. Pindaan-pindaan plaintif menyatakan bahawa Bacom secara palsu dan/atau fraud telah mengemukakan kepada defendan-defendan pertama hingga kelima yang ia akan mematuhi PP sedangkan ia tidak pernah mempunyai niat sebenar untuk berbuat demikian kerana ia mempunyai rancangan lain untuk memajukan tanah tersebut menjadi taman tema air/keluarga. Akibat daripada pindaan-pindaan tersebut kepada pliding Bacom telah memfailkan usul untuk memanggil semula saksi-saksi tertentu tetapi hakim perbicaraan menolak usul Bacom atas alasan bahawa isu-isu yang dipersetujui untuk dibicarakan kekal sama meskipun terdapat pindaan-pindaan kepada pliding. Bacom telah merayu terhadap keputusan ini ('rayuan interlokutori pertama'). Pada masa sama plaintif telah memohon untuk mengeluarkan penyataan-penyataan tertentu daripada afidavit representasi Bacom atas alasan bahawa penyataan dalam afidavit tersebut berkaitan dengan kedudukan kewangan plaintif. Hakim perbicaraan telah membenarkan permohonan untuk mengeluarkan berikut dan justeru itu rayuan interlokutori kedua ('rayuan interlokutori kedua'). Bacom telah membuat permohonan lisan untuk memanggil tiga saksi pakar, dua arkitek dan seorang juruukur, tetapi dibantah oleh plaintif. Permohonan ini telah ditolak atas alasan bahawa terdapat keperluan untuk pendapat selanjutnya keterangan pakar-pakar di mana terdapat keterangan yang mencukupi untuk menentukan liabiliti setiap pihak. Justeru itu rayuan interlokutori ketiga. Di penutup perbicaraan utama hakim perbicaraan Mahkamah Tinggi mendapati bahawa defendan-defendan pertama hingga kelima berhak menjual tanah tersebut kepada Bacom tanpa pengetahuan atau persetujuan plaintif dan tidak bertanggungjawab terhadap plaintif untuk apa-apa kehilangan atau kerugian. Walau bagaimanapun, dia mendapati bahawa Bacom tiada niat untuk terikat oleh PP apabila ia menandatangani PJB dan bahawa niat dan perlakuannya

bersifat fraud dalam skop s 17(c) dan (d) Akta Kontrak 1950 dan oleh itu, Bacom didapati bersalah kerana fraud sivil. Oleh itu Mahkamah Tinggi memutuskan bahawa PJB adalah terbatal dan tak sah dan patut diketepikan; bahawa tanah tersebut patut dipindahmilik semula oleh Bacom kepada defendan-defendan pertama hingga kelima selepas mereka membayar balik harga belian penuh kepada Bacom; bahawa defendan-defendan pertama hingga kelima patut menyempurnakan semula PP pertama menyebelahi plaintif; bahawa Bacom patut membayar ganti rugi untuk pelanggaran PP dan untuk fraud kepada plaintif dan kepada defendan-defendan pertama hingga kelima; dan bahawa tuntutan balas Bacom terhadap plaintif ditolak. Ini adalah rayuan Bacom terhadap penghakiman tersebut. Rayuan ini dan tiga rayuan interlokutori lain dihadapkan ke mahkamah ini dan pihak-pihak bersetuju untuk meneruskan rayuan terhadap penghakiman muktamad Mahkamah Tinggi dalam tindakan utama.

Diputuskan, membenarkan rayuan terhadap tindakan utama dengan kos yang perlu dibayar oleh plaintif kepada defendan-defendan pertama hingga kelima dan Bacom:

(1) Berlandaskan pliding plaintif dan defendan-defendan pertama hingga kelima sebelum pindaan-pindaan tersebut, mahkamah ini bersetuju dengan penemuan hakim perbicaraan bahawa defendan-defendan pertama hingga kelima sebagai pemilik tanah asal tidak melanggar PP apabila mereka memasuki PJB. Oleh kerana defendan-defendan pertama hingga kelima tidak bertanggungjawab terhadap plaintif untuk apa-apa kehilangan, kerugian atau kos, adalah diikuti bahawa prosiding pihak ketiga terhadap Bacom juga patut ditolak. Jika begitu, tuntutan secara langsung plaintif terhadap Bacom mengalami nasib sama berdasarkan doktrin priviti kerana Bacom bukan pihak kepada PP. Hakikat bahawa Bacom telah bersetuju dengan defendan-defendan pertama hingga kelima bahawa ia terikat dengan terma-terma PP adalah perkara antara kedua belah pihak dan tidak memberikan priviti kontraktual antara plaintif dan Bacom. Oleh itu adalah didapati bahawa hakim perbicaraan tidak mungkin membuat perintah agar PJB dan memorandum pindahmilik diketepikan dan berikutan itu memerintahkan pelaksanaan spesifik PP terhadap defendan-defendan pertama hingga kelima (lihat perenggan 100–102, 132(d) & (e)).

(2) Tuntutan plaintif terhadap Bacom kerana mempengaruhi dengan salah defendan-defendan pertama hingga kelima untuk melanggar PP, iaitu tuntutan dalam tort, juga tidak dapat dikekalkan. Berhubung isu fraud plaintif tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa Bacom telah bertindak tidak jujur terhadapnya semasa ia membeli tanah tersebut. Adalah undang-undang tetap bahawa beban bukti dalam tort sejajar dengan doktrin priviti. Plaintif bukan pihak kepada PJB dan oleh itu tidak boleh menguatkuasakannya. Oleh kerana

tiada bukti tipu daya dilakukan ke atas plaintif oleh Bacom, tuntutan dalam tort oleh plaintif terhadap Bacom tidak dapat dikekalkan. Hakim perbicaraan terkhilaf dalam memutuskan bahawa fraud dapat dibuktikan atas imbangan kebarangkalian (lihat perenggan 103, 113–115 & 133).

(3) Pindaan-pindaan kepada pliding yang dibuat oleh plaintif dan defendan-defendan pertama hingga kelima menggagalkan guaman ini, kerana pindaan-pindaan tersebut menukar arah bertentangan kedudukan awal yang diambil oleh mereka. Walau bagaimanapun, hakim perbicaraan memutuskan bahawa penyataan fakta-fakta dan iu-isu yang dipersetujui dikekalkan. Keputusan ini oleh hakim perbicaraan menunjukkan bahawa dia tidak menyedari perkara kontroversi selepas beliau membenarkan pindaan-pindaan tersebut. Ini satu kelemahan dalam kesimpulan fakta dan dari segi undang-undang yang diputuskan oleh hakim perbicaraan, iaitu fraud bukan isu yang dipersetujui untuk dibicarakan. Dalam kes ini, Bacom telah memasuki PJB dengan defendan-defendan pertama hingga kelima dan plaintif bukan pihak kepada perjanjian. Oleh itu, jika sekalipun Bacom tidak jujur dan mengamalkan tipu daya semasa ia memasuki PJB, orang yang terjejas adalah defendan-defendan pertama hingga kelima (lihat perenggan 104–107, 120, 125–126 & 135).

(4) Meskipun hujah plaintif bahawa Bacom telah memasuki PJB bagi tujuan membangunkan taman tema/air mendapat sokongan hakim perbicaraan, mahkamah ini mendapati bahawa tiada keterangan menunjukkan bahawa Bacom telah meneruskan perkara ini dengan menukar tanah tersebut untuk kegunaan komersial (lihat perenggan 117).

(5) Berdasarkan keterangan yang dikemukakan adalah jelas bahawa pada masa matan kerja-kerja yang patut dijalankan oleh plaintif sebagai pemaju belum dimulakan. Bahkan plainti masih belum mengemukakan kepada MDLBK notis untuk mula kerja-kerja kejuruteraan. Dalam keadaan kes ini, Bacom wajar membatalkan SKW kedua dan berikutnya memohon plaintif mengosongkan tanah tersebut. Bacom juga patut berjaya dalam tuntutan balasnya dan berhak mendapat ganti rugi yang perlu ditaksirkan penolong pendaftar kanan (lihat perenggan 132(f) & 134).

(6) Ketiga-tiga rayuan interlokutori patut dibatalkan kerana bersifat akademik berdasarkan keputusan dalam rayuan utama. Oleh kerana ketiga-tiga rayuan tersebut tidak diadili maka tiada isu kos (lihat perenggan 127–132 & 136).]

Notes

For cases on breach in general, see 3(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2566–2823.

For cases on inducement of breach of contract, see 12 *Mallal's Digest* (4th Ed 2010 Reissue) paras 665–674.
For cases on privity in general, see 3(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 4721–4753.

Cases referred to

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)
Narayanan v Official Assignee, Rangoon AIR 1941 PC 93 (refd)
Scruttons Ltd v Midland Silicones Ltd [1962] AC 446 (refd)
PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136 (refd)
Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 s 17(c), (d)
Income Tax Act 1967 s 138

Appeal from: Suit No KG 104 of 1998 (11) (High Court, Kuching)

WSW Davidson (James Lo with him) (James Lo & Partner) for the appellant/sixth defendant/third party.
Wong Kim Fatt (Albert Tang with him) (Chew, Jugah, Wan Ullok & Co) for the first respondent/plaintiff.
Lim Heng Choo (Lim & Lim Advocate) for the second to sixth respondents/first to fifth defendants.

Mohd Ghazali JCA (delivering judgment of the court):

[1] There are four appeals before the court. These appeals arose out of the same action, that is, Civil Suit No KG 104 of 1994 (II) in the Kuching High Court ('the main action'). The first three appeals relate to interlocutory matters. The fourth appeal, ie, Civil Appeal No Q-02–367 of 1999 is an appeal against the final judgment of the High Court in the main action. At the outset, counsel for the parties informed that they planned to go straight to the fourth appeal. We gave our consent to the request.

THE PARTIES

[2] The plaintiff (the first respondent in these appeals) is one Jong Chuk. The first to the fifth defendants (the second to the sixth respondents in these appeals) are individuals who were the registered co-proprietors of a piece of land described as Lot 29, Block 218 Kuching North Land District ('the said land').

[3] The appellant in these appeals is a locally incorporated company named Bacom Enterprises Sdn Bhd ('Bacom'). It was brought in as a third party by the first to the fifth defendants and became the sixth defendant. For ease of reference, except for Bacom, we will refer to the other parties as they were in the court below.

[4] The background to the dispute between the parties is as follows.

THE DEVELOPMENT AGREEMENT

[5] On 22 October 1991, the first to the fifth defendants and the plaintiff entered into an agreement ('the development agreement') over the said land wherein the first to the fifth defendants were described therein as 'the owners' and the plaintiff as 'the developer'. According to the recitals to the development agreement, the first to the fifth defendants have obtained approval from the relevant authorities to subdivide the said land into residential lots (marked as 'plan A' therein) and whereas the plaintiff wish to propose subdivision of the said land into commercial and residential lots (marked as 'plan A2' therein) and that the plaintiff has agreed to undertake the development of the said land subject to, inter alia, the following terms and conditions:

(a) the plaintiff shall, at his own costs and expenses, erect and complete for the first to the fifth defendants five units of double-storey semi-detached houses and one unit of a corner double-storey terrace house as shown in plan A if the proposed plan A2 is not approved by the relevant authorities;

(b) in the event the plaintiff shall be able to obtain approval of some six units (or thereabouts) of three-storey shophouses as shown in plan A2, the first to the fifth defendants shall have priority to take shoplots Nos 1 and 2, together with sublots Nos 23 and 24;

(c) the first to the fifth defendants' houses or shophouses, whichever are applicable, shall not be deemed to be completed unless and until occupation permits have been obtained by the plaintiff from the relevant authorities concerned;

(d) the first to the fifth defendants' houses or shophouses, whichever are applicable, shall be completed and delivered to them by the plaintiff within 18 months from the date of approval of the engineering plans having been obtained by the plaintiff from the relevant authorities or within 36 months from the date hereof, ie, from 22 October 1991 whichever is the earlier;

(e) the plaintiff shall, at his own costs, 'earth-fill' the said land to a suitable level, construct and complete retaining walls, access roads, culverts, drains and other items of infrastructure on the said land in strict compliance with the road and drainage plans approved by the relevant

authorities and which shall not be deemed to be completed unless and until certificate of fitness thereof has been obtained by the plaintiff from the relevant authorities concerned;

(f) in consideration of the plaintiff performing all his obligations under the agreement, the first to the fifth defendants shall transfer free from all encumbrances all the other remaining sublots to the plaintiff provided that the plaintiff shall have completed the first to the fifth defendants' houses or shophouses, whichever are applicable, and shall have obtained the individual issue document of title from the Land & Survey Department for the first to the fifth defendants' sublots;

(g) upon the signing of the agreement, the first to the fifth defendants shall allow the plaintiff to enter upon the said land to carry out survey and other works provided hereunder;

(h) upon the signing of the agreement, the first to the fifth defendants shall grant and execute a power of attorney appointing the plaintiff as their lawful attorney without authority to raise loan but to do certain acts including appearing before all relevant authorities in respect of the development of the said land and to submit all requisite plans for the development of the said land;

(i) time wherever mentioned shall be of the essence of the agreement;

(j) cl 17 of the agreement reads:

> In the event of the Owners committing substantial breach of any of the terms and conditions of this Agreement, or recklessly revoke and rescind this Agreement, and in such cases the Owners shall pay costs and expenses incurred by the Developer in developing the said land together with a further like sum as pre-estimated liquidated damages PROVIDED ALWAYS THAT this provision shall not prejudice the Developer's right to seek for specific performance of this Agreement in a Court of Law;

(k) cl 19 of the agreement reads:

> (i) If the Developer shall fail to complete the Owners' dwelling houses/shophouses (whichever are applicable) within the stipulated period for completion under Clause 4 hereinabove then the Owners hereby agree to give the Developer a final extension of six (6) months to complete the same PROVIDED THAT the Developer shall pay the Owners liquidated damages for the late-completion of the Owners' dwelling houses/shophouses (whichever are applicable) as follows:
>
> (ii) Only in the event that the Developer shall not be at fault in the delay and that delay of completion shall be caused by the competent authority or authorities concerned (if any), then after the expiry of the said final extension of six (6) months, the Developer can request for a further extension of three (3) months provided that the Developer shall give all

the reason(s) of such delay caused by the competent authority or authorities concerned together with the Developer's payment of the liquidated damages to the Owners as stated in clause 19(i) above.

THE FIRST POWER OF ATTORNEY

[6] On 23 January 1992, ie, three months after the execution of the development agreement, the first to the fifth defendants granted a power of attorney to the plaintiff which was registered on 25 January 1992 ('the first power of attorney'). It is provided therein that the first to the fifth defendants jointly and severally nominate and appoint the plaintiff to be their true and lawful attorney to do, inter alia, the following acts:

(a) to prepare project papers for the development of the said land into relevant building schemes;

(b) to prepare proposals for subdivision, layout engineering and building plans and all other requisite/necessary documents and instruments pertaining to the development of the relevant building schemes;

(c) to apply for approval of the subdivision, amalgamation, survey conversion and building plans on the said land relating to and connecting with the development of the relevant building schemes and that all this is supplemental to the development agreement;

(d) to manage, develop, build and construct buildings thereon as approved;

(e) to contract out for the construction of engineering and all building works pertaining to the relevant development/building schemes;

(f) to execute sign seal and deliver all deeds contracts receipts acknowledgment notices instruments, documents and letters necessary and proper for effectively doing or causing to be done any or all of the acts mentioned herein, 'but without authority to raise loan, charge or otherwise cannot 'deal' with the said land within the meaning of the Sarawak Land Code'.

THE DEED OF VARIATION

[7] By a deed of variation dated 19 February 1992, the first to the fifth defendants and the plaintiff varied the development agreement to the effect that if the proposed subdivision of the said land into commercial and residential sublots shall be approved for 14 shophouses together with the relevant residential sublots as shown in the amended site plan (marked as plan 'X' therein), the first to the fifth defendants shall be entitled to three units of shophouses and one unit of semi-detached dwelling-house as identified. However, if the proposed amended site plan marked 'X' is not approved, the

development agreement shall remain binding accordingly.

THE FIRST CAVEAT

[8] On 30 April 1993, that is, about 18 months after the execution of the development agreement, the plaintiff lodged a caveat ('the first caveat') purportedly to protect his interest in the said land. On 19 May 1993, ie, about 20 days later, the plaintiff withdrew the first caveat.

THE SALE AGREEMENT

[9] On 25 May 1993, that is, about 19 months after the execution of the development agreement and about six days after the first caveat was removed, the first to the fifth defendants sold the said land to Bacom and simultaneously revoked the first power of attorney. The recitals to the sale and purchase agreement ('the sale agreement') over the said land entered into between the first to the fifth defendants as vendors and Bacom as purchaser referred to, inter alia, the following:

(a) the development agreement;

(b) the deed of variation;

(c) the first power of attorney;

(d) the lodgment of the first caveat and its withdrawal;

(e) that Bacom has perused the development agreement, the deed of variation and the first power of attorney and 'is fully aware of and understands all their terms, provisions and stipulations'; and

(f) that the first to the fifth defendants as vendors are desirous of selling the said land and that Bacom as purchaser 'is desirous of purchasing the same free from all encumbrances and with vacant possession thereof in accordance to the terms and conditions hereinafter appearing'.

[10] The terms and conditions of the sale agreement were, inter alia, as follows:

(a) the purchase price is RM1.2m;

(b) that Bacom pay a sum of RM120,000 as deposit upon signing of the agreement;

(c) that the balance of the purchase price amounting to RM1,080,000 shall be paid within seven days from the date of signing of the agreement;

(d) that time wherever mentioned herein is of the essence of the agreement;

(e) cl 5 reads:

The Vendors hereby declare that at date of execution hereof, the Agreement, Deed and Power of Attorney are still subsisting and valid.;

(f) cl 6 reads:

The Vendors hereby shall revoke the Power of Attorney, but the Purchaser shall at the request of the Vendors and/or the Developer shall execute in favour of the Developer a fresh Power of Attorney in the same terms as the revoked Power of Attorney.;

(g) cl 7 reads:

The Purchaser hereby declares that in entering into this transaction with the Vendors, it has full knowledge and understanding of the Agreement, Deed and Power of Attorney, and upon registration of Memorandum/Memoranda of Transfer referred to in clause 3 hereof being effected, it is bound by the provisions of the Agreement read together with the Deed.;

(h) cl 8 reads:

The Purchaser hereby covenants with the Vendors that the Purchaser will perform and observe all stipulations agreements provisions and conditions respectively which are mentioned or contained in the Agreement and the Deed and on the part of the Vendors thereby agreed to be performed and observed and will keep the Vendors indemnified against all actions proceedings claims demands damages penalties costs charges and expenses by reason of non-observance of the Agreement and Deed or otherwise in relation thereto.;

(i) cl 9 reads:

Notwithstanding anything herein contained, if the Deed of Revocation pertaining to the Power of Attorney, and/or the Memorandum/Memoranda of Transfer referred to in clause 3 hereof cannot be registered without the written consent of the Developer, whose consent is withheld for whatever reason, then, in any such case, this Agreement and the Memorandum/Memoranda of Transfer shall become null void and of no effect whatsoever and the Vendors shall forthwith refund to the Purchaser all monies already paid pursuant hereto free of interest.

(j) cl 15 reads:

Notwithstanding completion of the sale and purchase herein the terms and conditions of this Agreement shall remain in full force and effect as between the Vendors and the Purchaser in so far as the same are not fulfilled.

THE SECOND POWER OF ATTORNEY

[11] Consequently, pursuant to the sale agreement, Bacom granted a power of attorney to the plaintiff ('the second power of attorney'), registered on 27 May 1993, appointing the latter 'to be our true and lawful Attorney for us and in our name and on our behalf to do all or any of the following acts or things …'; the 'acts or things' were identical to that as found in the first power of attorney. Clause 3 of the second power of attorney acknowledged that all these are 'supplemental' to the development agreement.

THE EVENTS LEADING TO THE DISPUTE

[12] By letter dated 8 June 1993 addressed to the plaintiff, Bacom requested for a progress report on the development of the said land.

THE SECOND CAVEAT

[13] On 11 June 1993 the plaintiff lodged a caveat against the said land ('the second caveat').

[14] In response to Bacom's letter dated 8 June 1993 requesting for a progress report, the plaintiff's solicitors by letter dated 12 June 1993 intimated that their client 'was extremely shocked at the events' leading to Bacom becoming the registered proprietor of the said land; inter alia, read as follows:

> 2. Our client has instructed us to state that he was extremely shocked at the events leading to your Company becoming the registered proprietors of the above-captioned land. Neither your Company's Managing Director, Mr David Goh, nor the previous owners of the land have ever indicated to him that there would be a transfer of ownership and the transfer was effected totally without his knowledge. The transfer of the above-captioned land to your Company is all the more surprising as on the 29th day of April 1993, your Mr David Goh hosted a dinner at the Holiday Inn, Kuching, in which our client, his son and Mr Foo Chow Lee of the Oversea-Chinese Banking Corporation Ltd, Kuching, amongst others, were present. During the course of the dinner, your Mr David Goh has offered to 'buy' the project on the above-captioned land from our client for a sum of RM2 million. Our client then indicated that he could not accept the offer because the previous landowners, who have signed a Development Agreement with him for the development of the above-captioned land, were involved and thus, our client was not in a position to accept without consulting the previous landowners.
>
> Thereafter, your Mr David Goh made what he called a 'final offer' of RM2.1 million, giving our client seven (7) days to consider the offer and get back to him. Our client never took up the offer and the next thing he knew was the above-captioned land has been transferred to your Company. It is obvious that

between the time of the aforementioned dinner and the date of the transfer of the above-captioned land on the 27th May 1993 to your Company, you and the previous landowners have done a deal behind our client's back. This is, to our client's mind, improper and irregular.

3. In the circumstances, before our client considers your request for a progress report, he would like to know your intentions. Accordingly, our client would appreciate it if you could let him have the following information:

(i) Does your Company intend to comply with and proceed in accordance with the terms and conditions contained in the Development Agreement dated the 27th October 1991 between the previous landowners and our client?

(ii) Is the offer to 'buy' the project on the above-captioned land from our client at the sum of RM2.1 million still open?

(iii) Is your Company prepared to formalise the contractual relationship (assuming you reply in the affirmative to query (i) hereof) by entering into a Novation Agreement between our client, the previous landowners and yourselves in respect of the Development Agreement dated the 22nd October 1991?.

[15] Bacom responded by sending several letters requesting that the plaintiff submit 'a full and accurate progress report with regards to the said land'.

[16] Meanwhile, by letter dated 22 June 1993, Bacom wrote to the Land & Survey Department intimating that it is desirous of converting the said land and two other pieces of land, namely, Lot 26 Block 218 KNLD and Lot 144 Block 207 KNLD, adjacent to the said land for commercial use, viz, a water recreation park, a food park and a warehouse sales outlet. It must be noted that at that material time, Bacom did not own the said two pieces of land.

[17] On the same date, ie, 22 June 1993 Bacom wrote to the Land & Survey Department and enquired about the status of the plaintiff's application for the development of a commercial and residential estate on the said land. By letter dated 25 June 1993, the Land & Survey Department responded by stating, inter alia, that the application for subdivision of the said land for 14 shophouses and 12 units of residential houses submitted by the plaintiff has been rejected. If we are not wrong, this would be the proposed amended site plan marked 'X' referred to in the deed of variation.

[18] Bacom consequently sent reminder letters to the plaintiff's solicitors in relation to its earlier requests for a full and accurate progress report with regard to the development of the said land. By letter dated 14 July 1993 the plaintiff's solicitors responded, inter alia, as follows:

5. Your Company's continued insistence on a written progress report is strange in view of its refusal to confirm compliance with the Development Agreement dated 22th October 1991 and has no contractual basis thereunder. Our client suggests that your Company avails itself of its right to view progress on the site.

6. Our client fully reserves his rights in the meantime and reiterates that he shall proceed and complete development of the captioned land in accordance with the terms and conditions of the Development Agreement.

[19] Despite the letter referred to above, Bacom sent further reminders to the plaintiff requesting for a full and accurate progress report.

[20] By letter dated 24 September 1993 Bacom informed the plaintiff's solicitors, inter alia, as follows:

> Upon receipt of your letter yesterday, we acted according to the last sentence to view progress on site.
>
> We were shocked that your client, who is not an 'international contractor', has turned our land into a rubbish dump site. As a non-international contractor, he has turned our land into rubbish filling versus earth filling by the ordinary local contractor. We have not only viewed the site but have recorded your client's action as evidence on photographs. Please see photographs attached.

[21] Thus, the relationship between the plaintiff and Bacom deteriorated. By letter dated 25 April 1994 Bacom wrote to the Kuching Rural District Council (KRDC) as follows:

> LOT 29 BLOCK 218 KNLD
>
> (1) We are the landowner of the above mentioned land. Enclosed herewith please find photocopy of document in title for your reference.
>
> (2) Whilst Bacom Enterprises Sdn Bhd have granted a P/A to Mr Jong Chuk, the latter have refused to cooperate with the landowner by refusing to give landowner any progress report and have turned the land into a rubbish tip.
>
> (3) Whilst the P/A allows him to submit project papers, proposals, plans, etc, copy of P/A enclosed herewith, it did not state that it allowed him to commence engineering works without the landowner's consent.
>
> Since the P/A holder is acting in a manner which does not take the landowner's interest into consideration, and is disregarding the landowner completely, we shall be most grateful if you will keep us informed of any correspondence or application that may be made.
>
> In view of the above, please do not approve any further application relating to engineering plan by our P/A holder without our knowledge and consent.

REVOCATION OF THE SECOND POWER OF ATTORNEY

[22] By a deed of revocation of power of attorney dated 30 April 1994 Bacom revoked the second power of attorney.

[23] By letter dated 14 May 1994, that is, about five months before the date due for completion of the works pursuant to the development agreement, Bacom informed the KRDC that the plaintiff is no longer 'our P/A holder' and that it 'do not wish to proceed with anything that Mr Jong Chuk has undertaken'.

[24] Simultaneously by letter dated 14 May 1994 Bacom informed the plaintiff as follows:

> LOT 29 BLOCK 218 KNLD
>
> This serves to inform you that you no longer have the power of attorney over our land as it was revoked on 30th April 1994.
>
> In that context, you are instructed to vacate from our land and remove your personal belongings within twenty four hours of receipt of this letter, otherwise you will be considered trespassing.
>
> The Land & Survey Department and Kuching Rural District Council have been informed of this revocation. In this connection, they would stop all development application.
>
> We hope for your kind co-operation herein.

[25] On the same date, ie, 14 May 1994 Bacom wrote to the Land and Survey Department intimating as follows:

> LOT 29 BLOCK 218 KNLD
>
> This is to inform you that Mr Jong Chuk (BIC K266171) is no longer our P/A holder.
>
> Enclosed herewith, please find a copy of the document in title and deed of revocation.

[26] By letter dated 27 May 1994 the plaintiff's solicitors wrote to Bacom as follows:

> We are instructed by Mr Jong Chuk to refer to your letter of the 14 May 1994 addressed to him wherein you purported to have on the 30 April 1994 revoked the Power of Attorney ….
>
> We are instructed to state that your said action is a breach of the Development Agreement entered into between our client and your predecessors-in-title.

Take notice that unless you remedy your breach by withdrawing your purported revocation within fourteen (14) [days] from the date hereof, our client shall [have] no choice but to seek redress in Court. Please note that all negotiations of amicable settlement between you and our client is without prejudice to our client's right to demand specific performance of the said Development Agreement.

THE SUIT

[27] On 19 September 1994, ie, about one month before the date due for completion of the development agreement, the plaintiff filed this action against the first to the fifth defendants. Bacom was then not named as a party.

[28] The plaintiff sought, inter alia, the following reliefs against the first to the fifth defendants:

(a) a declaration that the revocation of the first power of attorney and the sale of the said land to Bacom was in breach of the development agreement;

(b) if the court should set aside the sale agreement, for an order of specific performance of the development agreement and for the restoration of the first power of attorney and the first caveat;

(c) further or in the alternative, damages for breach of the development agreement.

THE DEFENCE OF THE FIRST TO THE FIFTH DEFENDANTS

[29] In their statement of defence, the first to the fifth defendants contended, inter alia, as follows:

(a) that the plaintiff is only entitled to 19 out of 25 sublots in the said land upon due completion of all their houses which the plaintiff has failed to do and in the premises, the plaintiff has not acquired any beneficial interest in the said land and that they could not in law be mere bare trustees to the plaintiffs beneficial interest as alleged or at all;

(b) that both parties to the development agreement were at liberty to sell and or assign their right, title and interest under it without the need for consent by the other party; in the premises, they will say that they are entitled to sell the said land to Bacom without the consent of the plaintiff and without giving any notice to him and hence are not in breach of the development agreement;

(c) that the plaintiff was at all material times fully aware of the sale of the said land to Bacom and to facilitate the sale of the said land had agreed to withdraw the first caveat on 18 May 1993 and consented to the revocation of the first power of attorney;

(d) that Bacom, as the successor-in-title of the development agreement and with the knowledge and consent of the plaintiff, executed a fresh power of attorney in favour of the plaintiff to facilitate him to continue with the development of the said land in accordance with the terms and conditions under the development agreement;

(e) that it is a term of the development agreement that time shall be of the essence; the plaintiff has failed to submit the necessary sub-division plans, engineering plans and or architectural plans promptly or within a reasonable time after the execution of the development agreement and only submitted the sub-division plans on 28 June 1993 and the engineering plans on 7 October 1993.

THIRD PARTY PROCEEDINGS

[30] Bacom was subsequently brought in as a third party by the first to the fifth defendants. As against Bacom, the first to the fifth defendants went on to plead the indemnity and other claims pursuant to the sale agreement and assert that in the event they are found liable to the plaintiff, they are entitled to a full indemnity against Bacom. Further, the first to the fifth defendants reiterated that the sale of the said land was made with the knowledge and consent of the plaintiff.

[31] As a consequence of Bacom being brought in as a party, the plaintiff took the opportunity to amend his pleadings and made a claim against Bacom, namely, that in pursuit of its intention to disable him from performing his obligations under the development agreement and in breach of the development agreement, Bacom purportedly revoked the second power of attorney and wrote to the relevant authorities to stop all his development applications as a result of which he suffered loss and damage as follows:

(a) loss of profit expected from the development of the said land following the revocation of the second power of attorney;

(b) carrying costs and interests thereon of approximately RM1m being the costs of site clearing, earth-filling and other incidental costs and expenses.

[32] Further and in the alternative, the plaintiff claimed that Bacom wrongfully and with intent to injure him procured and induced the first to the fifth defendants to breach the development agreement and to refuse to perform the same by inducing them to sell the said land and further inducing them to revoke the first power of attorney. He further claimed that Bacom falsely and/or fraudulently represented to the first to the fifth defendants that it would honour and abide by the development agreement and the deed of variation when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.

[33] The plaintiff then averred that by reason of such procurement and inducement, the first to the fifth defendants did breach and refuse to perform the development agreement as a result of which he has lost the benefits of the agreement and has been greatly injured in his business and have been put to considerable trouble, inconvenience and expenses and has thereby suffered loss and damage. In his effort to protect his beneficial interest in the said land, he caused to be lodged the second caveat on 11 June 1993.

[34] The plaintiff sought, inter alia, the following reliefs against Bacom, namely:

(a) a declaration that Bacom is bound by the terms and obligations contained in the development agreement;

(b) a declaration that the revocation of the second power of attorney is void, of no effect and in breach of the development agreement;

(c) an order for specific performance of the development agreement;

(d) an injunction to restrain Bacom from obstructing the plaintiff in carrying out the development of the said land under the terms of the development agreement;

(e) exemplary damages for inducing breach of the development agreement;

(f) further or in the alternative, damages for breach of the development agreement.

BACOM'S DEFENCE VIS-A-VIS THE PLAINTIFF'S CLAIM

[35] Bacom contended that the plaintiff, by withdrawing the first caveat had waived all his rights if any to the said land as well as his right to dispute Bacom's status as registered proprietor and has thereby surrendered and or forfeited all his rights to the said land.

[36] Bacom further contended that the plaintiff at all material times failed and refused to proceed as attorney in the terms as set out in the second power of attorney, namely:

(a) failed and neglected to carry out any development work on the said land;

(b) converted the said land into a rubbish collection site;

(c) failing and refusing to report about the progress of the development on the said land;

and that for the aforesaid reasons, the second power of attorney was lawfully

revoked in the light of the refusal and or failure by the plaintiff to fulfill his duties and responsibilities with the care skill and diligence required of an attorney.

[37] Further and/or in the alternative, Bacom contended that the second power of attorney being unilateral, voluntary and gratuitous was void and or voidable at their instance and conferred no benefit on the plaintiff who furnished neither consideration nor consent.

[38] Bacom also contended that there never was a separate plan to develop a water/family theme park and that further or alternatively, if there ever was such a separate plan, which is denied, it is irrelevant to these proceedings.

[39] With regard to the sale agreement, Bacom pointed out that the agreement was lawful and to which the plaintiff is non-privy to. It then denied having ever procured or induced the first to the fifth defendants to breach the development agreement.

BACOM'S COUNTERCLAIM

[40] In its counterclaim, Bacom averred that the second caveat has prevented the company from dealing with the said land for various purposes including, inter alia, using it as security for banking facilities and sale. By reason of the matters aforesaid, the company have suffered loss and damage and hence counterclaim against the plaintiff for an order that the second caveat be removed and for damages and costs.

THE TRIAL

[41] The trial commenced on 11 November 1996 premissed on a statement of agreed facts and a list of the substantive issues to be tried. The statement of agreed facts are the facts that were discussed earlier and we see no necessity to reproduce the same. The substantive issues to be tried as agreed by the parties were as follows:

(a) whether the plaintiff has beneficial and/or caveatable interest in the said land;

(b) whether the first to the fifth defendants and or Bacom are bare trustees for the plaintiff under and by virtue of the development agreement read with the first and second power of attorney;

(c) whether the first to the fifth defendants are entitled under cl 22 of the development agreement to sell the said land to Bacom without the knowledge or consent of the plaintiff;

(d) as between the first to the fifth defendants and the plaintiff, whether the former are in breach of the development agreement;

(e) whether the plaintiff is in anyway estopped from claiming against the first to the fifth defendants;

(f) as between the first to the fifth defendants and Bacom, whether Bacom is bound by the development agreement;

(g) as between the plaintiff and Bacom, whether the plaintiff has any right of action against Bacom, in particular to enforce on the terms of the development agreement and the second power of attorney;

(h) whether the plaintiff is justified and entitled to specific performance of the development agreement as against Bacom;

(i) if there was a breach of the development agreement by the first to the fifth defendants, whether Bacom is guilty of inducing the former to breach the agreement;

(j) whether Bacom is justified in revoking the second power of attorney and stopping the plaintiff from carrying out the works on the said land; and

(k) whether the first to the fifth defendants are entitled to claim for indemnity in this action against Bacom.

THE PLAINTIFF'S CASE

[42] Four witnesses gave evidence for the plaintiff, namely, the plaintiff himself (PW1), Ismawi Batu (PW2) who was formerly the executive chairman of a company named Bacom & Bintulu Fertilizer Sdn Bhd ('BBFSB') of which Bacom is a subsidiary company, Eric Tan (PW3) who was formerly the senior manager of BBFSB and Mark Chin (PW4), an advocate and solicitor.

[43] In his evidence the plaintiff claimed that he spent 'about RM1 million on the land inclusive of wages of workers and earth filling' before he 'stopped work'. He claimed that he only knew that the said land was sold sometime in June 1993. With regard to the first caveat, he said:

> I withdrew this caveat because the 2nd defendant told me that the relative was sick, and this would help the relative to transfer his land and thereafter I can re-lodge the caveat.

The plaintiff then insisted that the second defendant never told him of the intention to sell the said land and that when it was sold, he went to see the second defendant and 'protested'. He agreed that he had 36 months to complete the development on the said land, that is, by 21 October 1994 and admitted that the engineering plans were only approved on 2 April 1994; he said:

Assuming I started in April 1994 and I could complete the work by end October 1994 and if I could not I can ask for extension and pay liquidated damages in Clause 19.

[44] Under cross-examination, the plaintiff agreed that he submitted only one sub-division plan and admitted that that plan was rejected by the Land & Survey Department. He agreed that without the approval of the engineering plans, he would be unable to commence work for the drains and roads. He stated that he did not submit a work progress report to Bacom as that was not a requirement under the development agreement and not because no work had been carried out by him on the said land.

[45] In his evidence Ismawi Batu (PW2) stated that when he was the executive chairman of BBFSB, David Goh (6DW1), the managing director of Bacom was also the managing director of BBFSB. He testified that at the material time David Goh wanted to acquire the said land to build a water theme park; he said:

Plan of Bacom to turn into a Water Theme Park - involving 3 pieces of land. If Jong Chuk carried out its building plan, it would not be possible to build the Water Theme Park with a road frontage. Bacom overcome the problem by Bacom plan to revoke Power of Attorney.

[46] Eric Tan (PW3) testifed, inter alia, as follows:

I know that Bacom bought Lot 29 in 1993. David Goh told me. Jong Chuk had a development agreement and Power of Attorney over this land. David Goh told me about his plan — he wanted to develop the land with adjoining land into a huge Water Theme Park. Jong Chuk was Power of Attorney holder and was an obstacle to land. David Goh asked me in early 1994.1 was called back from Kuantan and I was to negotiate and make an offer to Jong Chuk. In February 1994 and I approach Jong Chuk. Jong Chuk did not agree to any proposal. I met him a couple of times to make offers to him and to convince him to quit. He did not quit. In April 1994 I heard from David Goh the Power of Attorney was revoked because Jong Chuk was serious in development. He was going ahead with the development plan and the company's plans would be jeopardised.

Under cross-examination, PW3 admitted as follows:

My relationship with David Goh was bad after the breach of contract arising out of management contract.

[47] In his evidence, Mark Chin (PW4) testified that he prepared the development agreement, the first power of attorney and the deed of variation. With regard to the first caveat, he said:

> Caveat of 15.1.93 prepared by me. I have bee[n] instructed to prepare the caveat by Jong Chuk to protect his interest. At that point of time, Jong Chuk told me that clearing had been done on the land. I can't remember why caveat registered on 30/4/93. (Page 35 AB) I prepared the withdrawal of caveat. This was requested by the owners, the 2nd defendant and his son Denis was with him. One of the Chongs was sick and requiring an operation, requested Jong Chuk to withdraw the caveat, so that the sick Chong could settle family dealing. Jong Chuk agreed to the request.

[48] With regard to the sale of the said land, PW4 said:

> Chongs assured and told Jong Chuk not to worry and that the new land owners will honour the agreement. Jong Chuk was confused and asked for my opinion regarding how to solve it. I told him that since the new owners would honour the Agreement and Deed of Variation, there was nothing to worry — he might continue with his work. I asked him to see another lawyer as I was acting for both parties in the Agreement — not my practice. I don't think Jong Chuk would withdraw the caveat if he knew of the intention. I think, I would advise them to enter into a new agreement -i.e. novation agreement.

THE FIRST TO THE FIFTH DEFENDANTS' CASE

[49] Three witnesses gave evidence for the first to the fifth defendants, namely, Chong Tung Shin (DW1), ie, the second defendant, Denis Chong Sing Kong (DW2) who is the second defendant's son and Chong Tung Fatt (DW3), ie, the fifth defendant.

[50] In his evidence DW1, the second defendant stated that the plaintiff 'did not earth-filled the land' as required under the development agreement but filled the said land 'with wooden planks, bricks etc from King Centre'. He also testified that the plaintiff did not construct any house on the said land and did not show 'any plan — sub-division or engineering — that he submitted to Land & Survey'.

[51] With regard to the first caveat and the sale of the said land, DW1 said:

> Before sale to Bacom, Denis informed Jong Chuk of proposed sale. As far as I know, Jong Chuk agreed to withdraw the caveat. At Mark Chin's office in May 1993, I did not go but my younger brother, Joseph Chong and Denis Chong went. I was not aware of the discussion at Mark Chin's office. Jong Chuk said that the Chongs had told him that one Chong was ill at hospital.
>
> 27th May 1993 the land was sold to Bacom i.e. 20 months after the signing of the Agreement. I was not aware that any of the plan had been approved. I was not aware that Bacom proposed to build a Theme Park before sale of land to Bacom. The intention to sell to Bacom was to ensure that the development agreement continued. If we knew of Bacom's proposal, we would not have sold the land. After the sale — Jong Chuk did not protest about it.

[52] Under cross-examination, DW1 said as follows:

> Before the Agreement, we had approval for sub-division of Lot 29. We used ABM Architect for this. After the Agreement, Jong Chuk continued to use the ABM Architect. It was ABM who helped Jong Chuk to submit a fresh proposal shophouses.

DW1 further said 'It was of inaction — I sold the land to Bacom'.

[53] In his evidence, DW2 stated that as David Goh was interested in buying the said land, he asked him to approach the plaintiff. He testified that the plaintiff never protested to the sale of the said land and that before it was sold, the plaintiff agreed to withdraw the first caveat. DW2 confirmed that he went to PW4's office for the withdrawal of the first caveat. He also testified that it was not true that the sale of the said land and the revocation of the power of attorney was made without the plaintiff's consent.

[54] In his evidence DW3, the fifth defendant confirmed that the plaintiff agreed to the withdrawal of the first caveat and that the plaintiff did not protest to the sale of the said land. He also confirmed that 'nothing much was done' by the plaintiff with regard to the said land. Under cross-examination, he said that David Goh 'did not induce us to sell the land' and 'did not induce us to revoke the Power of Attorney'.

[55] The first to the fifth defendants closed their case on 16 November 1996 and the trial was adjourned to another date for continuation. The following events then took place:

(a) on 5 March 1997, the first to the fifth defendants filed an application to amend their statement of claim against Bacom in the third party action; on 17 April 1997, the court allowed the application;

(b) simultaneously, on 17 April 1997 the court granted leave to the plaintiff to amend his statement of claim in the main action;

(c) on 30 April 1997, the plaintiff filed his amended statement of claim and the first to the fifth defendants filed their amended statement of claim in the third party action;

(d) on 11 June 1997, Bacom filed its re-amended defence and counterclaim in the main action and its amended defence in the third party action;

(e) on 28 June 1997 Bacom applied for leave to amend its re-amended defence and counterclaim;

(f) on 5 July 1997 the plaintiff applied to strike out Bacom's re-amended defence and counterclaim;

(g) on 4 August 1997 Bacom filed a notice of motion to recall certain witnesses;

(h) on 6 August 1997 the court allowed the plaintiff's application to strike out Bacom's re-amended defence and counterclaim and dismissed Bacom's application for leave to amend its re-amended defence and counterclaim; and

(i) simultaneously on 6 August 1997 the court ruled that Bacom's application to recall witnesses consequent upon the amendment to the pleadings of the plaintiff and the first to the fifth defendants to stand adjourned until the close of the case for Bacom.

[56] On 8 August 1997, Bacom opened its case (it closed its case on 21 August 1998). Before illustrating what transpired in the course of Bacom's case, we would at this stage highlight the amendments made to the pleadings by the parties.

[57] The amendments made by the first to the fifth defendants against Bacom in the third party proceedings can be summarised as follows:

(a) that in order to induce them to sell the said land, Bacom made the following representations and statements fraudulently and falsely, namely —

(i) that Bacom would be bound by the terms and conditions of the development agreement;

(ii) acting on the faith and truth of the said representations and fraudulently and falsely induced, they agreed to sell and transfer the said land to Bacom;

(iii) Bacom made the said representations and statements fraudulently and falsely knowing they were false and untrue;

(b) that they have since discovered during the trial of this action that the said representations were untrue in that Bacom —

(i) had no intention to be bound by the terms and conditions of the development agreement from the very beginning;

(ii) had no intention to continue or complete the project as provided under the development agreement;

(iii) had the intention to convert the said land into a family theme park even before the making of the development agreement;

(c) by reason of the matters aforesaid, the sale agreement and the respective memorandum of transfers of the said land were procured by the fraud of Bacom and is therefore null and void.

[58] Arising from the above amendments, the first to the fifth defendants sought the following reliefs against Bacom:

(a) a declaration that the sale agreement is null and void and the same be rescinded for fraud;

(b) a declaration that the respective memorandum of transfers of the said land to Bacom are null and void and the same be annulled, cancelled or rescinded for fraud; and

(c) a declaration that the said land be transferred or reverted to them.

AMENDMENT OF PLEADINGS BY THE PLAINTIFF

[59] The trial was then fixed for continued hearing on 4 August 1997. On that date, the plaintiff applied to amend his pleadings to include the following reliefs which were allowed by the court, namely, as against the first to the fifth defendants, should the court set aside the sale agreement and the memorandum of transfers, for an order of specific performance of the development agreement and also the restoration of the first power of attorney and the first caveat.

BACOM'S APPLICATION TO RECALL WITNESSES

[60] On the same date, ie, 4 August 1997 Bacom filed a motion to recall the witnesses who gave evidence for the plaintiff and the first to the fifth defendants for further cross-examination arising from the amendments made to the pleadings with regard to the allegations of fraud against the company including the following:

(a) the events leading to the sale of the said land and thereafter;

(b) the circumstances which resulted in termination of the relationship between the plaintiff and Bacom; and

(c) to show that there was no exercise of fraudulent misrepresentation.

[61] The learned trial judge ordered that the motion to recall the witnesses be heard after Bacom has closed its case. Bacom closed its case on 21 August 1998. The learned trial judge later heard this motion on 19 November 1998 and on 24 November 1998 dismissed it on the ground that the issue of fraudulent misrepresentation is not a new issue and that the agreed issues to be tried in the main action remained the same. This decision is the subject-matter of the first appeal. It will be discussed later in this judgment.

BACOM'S CASE

[62] On 8 August 1997, Bacom opened its case. Eleven witnesses gave evidence for Bacom.

[63] David Goh (6DW1) testified that on 16 April 1993, he made a land search on the said land. He then arranged a few meetings with the plaintiff. In the course of these meetings, the plaintiff gave him a photocopy of the layout plan of the proposed development on the said land and seemed to be interested in Bacom's proposal to purchase the said land. David Goh then made an offer of RM2m. On 30 April 1993 the plaintiff informed him that the selling price for the said land was RM4m.

[64] David Goh later negotiated with the first to the fifth defendants which resulted in the execution of the sale agreement. He then discovered that the plaintiff had lodged the first caveat against the said land. It was then agreed that the first to the fifth defendants would be responsible for the removal of the first caveat. On 27 May 1993, after the first caveat was removed, Bacom became the registered owner of the said land.

[65] David Goh testified that the plaintiff was aware of the sale agreement. He later visited the said land and noted that the plaintiff 'had dumped rubbish on the land, ie, small pieces of plank, cement bags, stones, broken bricks, broken tiles'. He then requested the plaintiff to 'remove the rubbish' but nothing was done. He was of the view that 'no contractor is entitled to fill the said land with rubbish from other sites' and that there was no construction activity on the said land 'to give rise to such rubbish-or construction waste — it had to come from somewhere else'.

[66] With regards to the 'Water Theme Park', David Goh stated that that idea was 'dropped long ago'. He then testified that he subsequently made a search at the Land & Survey Department and discovered the following:

(a) that the plaintiff's application pursuant to the deed of variation, ie, plan 'X', referred to earlier, was rejected in April or May 1993 and that his appeal to the relevant authorities was also rejected sometime in December 1993;

(b) that after Bacom became the registered owner of the said land, the plaintiff forwarded another application for subdivision pertaining to 24 units of houses;

(c) that the plaintiff 'had never at any point of time submitted a plan as per Development Agreement dated 22/10/91'.

[67] In relation to the testimonies of PW2 and PW3, David Goh said:

> Ismawi Batu and Eric Tan had hurt my feelings. There is no truth in those allegation of them — their intention was to continue hurting me.

I have only seen Ismawi once and I have no relationship whatsoever with him now. I also had no relationship with Eric Tan. I passed the land every day and even as today there is no evidence of substantial work done by Jong Chuk.

[68] With regard to the plaintiff, David Goh said:

The reason why I terminated Jong Chuk was because there was no physical work done for 1 year. We received no progress report and that led me to the conclusion that Jong Chuk neither have the time or money to complete the contract. In the remaining 514 months or so I feared he would cause irreparable damages to the land.

I gave the Power of Attorney to Jong Chuk to enable him to proceed with the Development Agreement and that's why on 7/6/93 I made photocopies of the land titles and Power of Attorney to the maker the lawyer who made the Development Agreement.

[69] In relation to the allegations made by the first to the fifth defendants in their pleadings as amended, David Goh said:

I deny ever inducing the Chongs with any ulterior motive. The Chongs have 2 experience with two contractor and have been waiting for 10 years for a roof over their heads. When I agreed to the terms on cash transaction they were very enthusiastic. Joseph Chong who handled the transaction on behalf of the Chongs, was asked whether he wanted to know the amount of commission that Denis Chong was receiving. Joseph Chong's reply was that they were happy with the transaction as they finally have their individual houses from the sale of the land to the company. Ismawi and Eric Tan were never parties to the negotiation with the Chongs. I have not the faintest idea that the Chongs had told Jong Chuk of the sick uncle story and they had never told me until the commencement of this trial.

[70] Under cross-examination, David Goh stated as follows:

(a) that he gave the second power of attorney to enable the plaintiff to proceed with the development agreement;

(b) that Bacom was bound by the development agreement through the first to the fifth defendants and that Bacom has to honour the same;

(c) that the plaintiff had not submitted any development plan;

(d) that in January 1994 he orally informed the plaintiff that if the latter did not proceed with the construction, he would 'terminate' him; and

(e) that the development agreement expired on 22 October 1994 and that if the plaintiff had completed the project, Bacom would have six units of houses.

[71] Chen Chi Yong (6DW3), the Head of Department in the Engineering Department of the KRDC between 1993 to 1994, testified as follows:

I remember meeting David Goh in April 1994.

I have shown him a copy of a Notice for Commencement of civil engineering work i.e. the Notice of Commencement of roads and drains. It was a blank form.

First the engineering plan would have to be approved by Land & Survey Department. Then the contractor would submit the notice for the commencement of the engineering work to KRDC. The KRDC would take 2 weeks to approve the notice. After the notice approved then the contractor can commence work on site i.e. engineering works. The contractor needs to submit its building plans for approval by KRDC. Before the building plan approved no building construction can commence. After the approval of the civil engineering plan the contractor can submit the building plan. On an average the KRDC would lake 5-6 months to approve a building plan.

(Page 9 Supplementary Bundle) Parts shaded are reserved for roads and drains. Lots 5 -13 are terraced houses. Lots 15-24 are semi-detached houses.

A developer cannot develop Lot 5 only. He has to build 3 blocks of semi-detached houses. In order for developer to get occupation permit he must complete the infrastructure work. KDRC issue the occupation permit. It takes about 3-4 weeks to approve a permit.

[72] In his evidence, Kua Jak Loi (6DW6), an engineer with the Padawan Municipal Council, which was then the new name for the KRDC, testified as follows:

Since 1st June 1995 I work there. Now I am the acting Council Engineer.

Lot 29 comes within the Padawan Municipal Council. Approval is required to develop land within the Padawan Municipal Council. Submission of building plan — we will check if the engineering plan had been approved by the council. When engineering plan has been approved, then building plan will be submitted. Before submission of engineering plan, he has to submit the sub-division by the Land & Survey. Land & Survey will forward the engineering plan to Padawan Municipal Council for registration and processing.

It takes about 4-6 months minimum time. When the engineering plan has been checked by Padawan Municipal Council, it is submitted to a Work Committee, which will endorse it. Then sent to JKR and after that it will be sent to Land & Survey which will give final approval and inform the Padawan Municipal Council that engineering plan has been approved.

The engineering plan was submitted to Padawan Municipal Council. The engineering plan has to be approved and the building plan submitted. The building plan had been approved by the Council. Building plan takes 4-6 months to be approved.

> When the building plan is received, we give it a number. Then it will be sent to various government agencies for their comment. After that if there is amendment, we inform the applicant officially. When all is completed, the [sic] recommend to the Committee for approval. Various agencies, e.g. Bomba, Land & Survey, public health section.
>
> Engineering plan for Lot 29 was approved by Land & Survey on 2nd April, 1994. According to record, building plan was not approved. According to record, building plan was approved on 16.8.1963 — submitted by Mdm Lee Ong Moi. The relevant authority for the submission of building plan is the Council. There was no other building plan other than this.
>
> No building plan was submitted.

Under cross-examination, 6DW6 confirmed that there was no record of any building plan submitted to the Padawan Municipal Council.

[73] Professor Bujang Kim Huat (6DW7), who was the dean of the Faculty of Engineering, UNIMAS testified that he was engaged by Bacom to carry out tests on the said land. He said the object of this exercise was to determine the type of land fill material and the thickness of fill above the original ground and 'to determine the principal properties of the material, ie, the consistency of the fill — state of fill — loose, very loose or dense'. In relation to the condition of the said land, Professor Bujang opined as follows:

(a) the ground was not levelled;

(b) the fill was not properly made; there was evidence of broken bricks, stones and slabs lying on the surface;

(c) for a good foundation, the top soil has to be removed, top soil are soft materials full of vegetation and hence need to be removed;

(d) filling has to be done by layers and each layer needs to be compacted;

(e) that the fill 'was constantly from loose to very loose, supported by Density test - was not being carried out to the standard specification of JKR'; and

(f) that 'construction wastes are not good fill' and that 'sand fill is good material'; that 'construction waste could not be compacted'; that 'construction waste not accepted nor the mixture of wastes or vegetation matters'.

[74] Sim Wee Lee (6DW11), a manager with Bacom testified that Ismawi Batu (PW2) was a sleeping partner and not involved with 'the day to day administration' of Bacom and that the relationship between PW2 and David Goh 'turned bad at end of 1994 and early 1995'. He said:

> The relationship of Ismawi Batu and David Goh was initially very good and later deteriorated because of some differences. Ismawi Batu is no longer with the company. Ismawi Batu initiated mass resignations of 3 personnel and affected the company adversely. He even asked me to leave the company. At that time I was the Secretary.
>
> There were hostilities between David Goh and Ismawi Batu. Ismawi Batu collected cheques worth about RM2 million and refused to bank into the company account. He wanted to change to normal current account with cheques. He was the sole signatory for the cheques. He would not stop until all Mrs. David Goh's jewellery was finished. He was all out to bankrupt David Goh. He left in July I995 after a settlement agreement.

[75] As mentioned earlier, Bacom closed its case on 21 August 1998. The learned trial judge reserved his judgment. The judgment on the main action, ie, the fourth appeal was subsequently delivered on 12 April 1999. It would be appropriate at this stage to deal with the interlocutory appeals before venturing into the appeal relating to the main action.

THE INTERLOCUTORY APPEALS

Civil Appeal No Q-02–826 of 1998 (the first appeal)

[76] As discussed earlier, on 4 August 1997, Bacom filed a motion to recall certain witnesses who gave evidence for the plaintiff and the first to the fifth defendants for further cross-examination arising from the amendments made to the pleadings with regard to the allegations of fraud. The learned trial judge ordered that this motion be heard after Bacom has closed its case. Subsequently, on 24 November 1998, ie, three days after Bacom had closed its case, the learned trial judge dismissed the motion on the ground that 'the agreed issues to be tried remain the same'; he said:

> The issue of fraudulent misrepresentation raised by the 1st - 5th Defendants is not a new issue and 6D/TP is not caught by surprise. The 1st - 5th Defendants had no knowledge that the 6D/TP has no intention to be bound by the terms of the Agreement between the 1st - 5th Defendants and the 6D/TP. However during the trial of this action it became apparent that 6D/TP had no intention to be bound by the Agreement.

Civil Appeal No Q-02–827 of 1998 (the second appeal)

[77] By way of summons in chambers dated 6 November 1998, the plaintiff made an application to expunge certain statements from an affidavit of David Goh made on behalf of Bacom dated 6 October 1998 relating to the financial standing of the plaintiff. The application was heard on 18 November 1998 and on 24 November 1998 the learned trial judge allowed the application to

expunge on the grounds that the statements concerned are scandalous and irrelevant. This is the subject-matter of the second appeal. In his grounds of judgment, the learned trial judge said:

> 2 The relevant para 6(b) of the said affidavit is reproduced below:
>
> (b) I have also become in receipt of the accounts signed by the Plaintiff in respect of his trading firm, Thong Huat Construction (which is owned by him solely) for the years 1992, 1993 and 1994. From these accounts, the Plaintiff himself declared the total costs expended by him on Lot 29 was RM141,860.60. This is contrary to the Plaintiffs claim in Para 25 of the Statement of Claim and his testimony in court. Now produced and shown to me marked respectively as 'Exhibit A-1, A-2 and A-3' are copies of the accounts.'
>
> 3. There are two grounds in support of this application:
>
> (a) The affidavit of David Goh Swe Chau has not revealed the source of information in contravention of O 41 rr 5 & 6 of the Rules of the High Court 1980; and
>
> (b) The tax file of Thong Huat Construction are classified materials under s 138 of the I ncome Tax Act 1967.
>
> 12. 12 On the totality of the evidence, I hold that para 6(b) and exhs A-l, A-2 and A-3 of David Goh's affidavit dated 4 September 1998 are in contravention of O 41 rr 5 & 6 of the Rules of the High Court 1980 are scandalous, irrelevant and/or otherwise oppressive. I would allow the application with costs to the plaintiff in any event.

Civil Appeal No Q-02–828 of 1998 (the third appeal)

[78] On 18 November 1998, the learned trial judge dismissed an oral application made by counsel for Bacom to call three expert witnesses, namely, one Simon Woon Ta Meng and Anthony Law Ka King who are architects and one Allan Chew who is a registered surveyor. The application was objected to by the plaintiff on the grounds that their opinion would be irrelevant to the issues before the court and further that their opinion would deal with the 'financial viability' of the development works undertaken by the plaintiff on the said land which was not one of the issues to be tried. In dismissing the application the learned trial judge said:

> In my view, there is more than ample evidence before the court for the purpose of determining the liabilities of each party. There is no need for further opinion evidence of experts. Suffice to say that if the court accedes to the sixth defendant/third party's request, it would unnecessarily lengthen the trial, delay the proceedings which caused a waste of time and increase the costs. It does not serve any useful purpose. It would be unfair and prejudicial to both the plaintiff and the first to the fifth defendants' case, and in the interest of justice to all the parties, I would dismiss the application with costs in the cause.

Judgment of the High Court in the main action (Civil Appeal No Q-02–367 of 1998)

[79] In his grounds of the judgment the learned trial judge was of the view that the most important provisions of the sale agreement would be the following, namely:

(a) cl 7 which reads:

> The Purchaser hereby declares that in entering into this transaction with the Vendors, it has full knowledge and understanding of the Agreement, Deed and Power of Attorney, and upon registration of Memorandum/Memoranda of Transfer referred to in clause 3 hereof being effected, it is bound by the provisions of the Agreement read together with the Deed.; and

(b) cl 8 which reads:

> The Purchaser hereby covenants with the Vendors that the Purchaser will perform and observe all stipulations agreements provisions and conditions respectively which are mentioned or contained in the Agreement and the Deed and on the part of the Vendors thereby agreed to be performed and observed and will keep the Vendors indemnified against all actions proceedings claims demands damages penalties costs charges and expenses by reason of non-observance of the Agreement and Deed or otherwise in relation thereto.

[80] On the facts of the case, the learned trial judge was of the view that from the outset Bacom had no intention whatsoever of being bound by the development agreement when it entered the sale agreement; in his grounds of judgment the learned trial judge said:

> When the plaintiff's engineering plans were approved by the authorities on the 2 April 1994 (AB 113), and after the plaintiff, pursuant to the said agreement, had submitted his notice of commencement of works dated 11 May 1994 barely three days later 6D/TP by letter dated 14 May 1994 (AB 122) notified the plaintiff of its earlier revocation of the Power of Attorney on 30 April 1994 and asked the plaintiff to vacate the said land within 24 hours, thus evincing a very clear signal from the very beginning that 6D/TP had no intention whatsoever to be bound by the said agreement when it signed the second agreement with the first to the fifth defendants on 25 May 1993.
>
> Thus the evidence is very clear that from the very beginning that both the intention and conduct of 6D/TP were fraudulent within the ambit of ss 17(c) and (d) of the Contracts Act 1950. In my opinion, there can be no doubt, on the evidence, that 6D/TP was guilty of civil fraud. See *Ang Hiok Seng v Lim Yut Kiu* [1997] 3 MLJ 45 (FC)... at p 59, applied by the Court of Appeal in *Ong Ban Chai v Seah Si Ang Mong* [1998] 3 MLJ 346, regarding criminal fraud and civil fraud. It is convenient here to quote s 17 of the Contracts Act 1950 which reads as follows:

A 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

B (b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

C (e) any such act or omission as the law specially declares to be fraudulent.

[81] The learned trial judge pointed out that the trial is only on the question of liability of the first to the fifth defendants and Bacom; he said:

D At the outset on 11 November 1996, learned counsel for the parties agreed that the parties would be bound throughout the proceedings by two documents dated 9 November 1996 viz:

(a) Statement of Agreed Facts — marked A; and

E (b) Agreed issues to be tried — marked B.

It should be noted that they remained the same throughout the entire proceedings. There is also an agreed bundle of documents, marked 'AB'

It may also be noted that it was agreed on 11 November1996 (p 2 notes of proceedings) that the question of damages, if any, was to be decided later on. Therefore the trial is only on the question of liability of the first to the fifth defendants and 6D/TP.

[82] The learned trial judge noted that it was not in dispute that the G plaintiff's engineering plans were approved on 2 April 1994 by the Land & Survey Department and that shortly thereafter the plaintiff submitted his 'Notice of Commencement of Works' to the relevant authority on 11 May 1994. However, by letter dated 14 May 1994 Bacom wrote to the KRDC to inform that the plaintiff was no longer the holder of the second power of H attorney and that Bacom does not wish 'to proceed with anything that Mr Jong Chuk has undertaken'. An identical letter was also sent to the Land & Survey Department. Thus thereafter, the plaintiff was no longer in a position to carry out the works on the said land under the development agreement.

I **[83]** The learned trial judge also noted that the plaintiff's claim that he would be able to complete the works on time was not challenged by either the first to the fifth defendants nor Bacom during the trial. He further noted that David Goh had admitted that the plaintiff was in a position to complete the project within the stipulated time.

[84] At the end of the day, the learned trial judge ruled that the revocation of the second power of attorney and the termination or repudiation of the development agreement by Bacom were wrongful for, inter alia, failure to give the three months notice in writing under cl 18 of the development agreement specifying the breach or breaches to be remedied.

[85] With regard to the evidence of Ismawi bin Batu (PW2) who testified that the water theme park was planned by Bacom prior to the purchase of the said land, the learned trial judge was of the view that it is clear from the evidence of PW2 that the plaintiff was able to complete the works under the development agreement and that Bacom had no intention of honouring the agreement.

[86] In relation to the Bacom's letter dated 22 June 1993, referred to earlier, wherein Bacom made an application to convert, inter alia, the said land for commercial use, the learned trial judge was of the view that this letter 'is clear and unequivocal proof of fraudulent intention of Bacom and David Goh not to honour the development agreement' and that 'this revealing letter speaks for itself … '. The learned trial judge then highlighted the following evidence of PW2 with regards to the above letter as follows:

> Bacom wrote to Land & Survey to apply for commercial zone on the same piece of land.
>
> This was done when Jong Chuk still had the Power of Attorney. (Page 78 AB) This is the letter I was referring to, and I signed it. David Goh drafted this letter — land conversion. Letters to Land & Survey was a cosmetic ploy reason being a Bumiputra.
>
> Paragraph 1 — from commercial zone knowing that it was already approved for residential use.
>
> Engineering plan approved on 2nd April, 1994.
>
> Bacom felt that Jong Chuk would be able to carry on with the project, use the extension clause of 6 months and complete the project. We unilaterally withdrew or revoke his Power of Attorney. From the beginning Bacom had wanted the land. Bacom had no intention to allow Jong Chuk with the development. There was discussion with bank for the development. From the company's view, Jong Chuk or Water Theme Park - Water Theme Park was more lucrative.
>
> Water Theme Park is a recreational park of about 10 acres - a combination of 3 pieces of land.

[87] In his judgment the learned trial judge also referred to the evidence of Eric Tan (PW3) in relation to the following:

(a) that David Goh informed him that he wanted to develop the said land as a theme park;

(b) that the plaintiff as donee of the first power of attorney was an obstacle;

(c) that he (PW3) was called back from Kuantan to negotiate and make an offer to the plaintiff; and

(d) that he was of the view that the development agreement was binding on Bacom.

[88] Consequently, the learned trial judge found that there can be no doubt from the documentary evidence and the admission of David Goh that the development agreement was binding on Bacom. He also found that pursuant to cl 8 of the sale agreement, Bacom is clearly liable to the first to the fifth defendants for indemnity and contribution for all costs and damages to the plaintiff's claim in this action; the learned trial judge said:

> Based on the oral and documentary evidence, I find that there is ample evidence to establish the plaintiffs and the first to the fifth defendants' claim that 6D/TP had no intention to be bound by the terms and conditions of the said agreement from the very beginning as it had at all material times the intention to convert the said land into a water theme park.

[89] As discussed earlier, the learned trial judge found that Bacom was guilty of civil fraud. He was of the view that from the very beginning both the intention and conduct of Bacom was fraudulent within the ambit of ss 17(c) and (d) of the Contracts Act 1950. That being his finding, he ruled that the sale agreement and the memorandum of transfers of the said land were procured fraudulently by Bacom through David Goh, and are 'therefore null and void, and ought to be set aside for fraud'; the learned trial judge said:

> I find that the title of 6D/TP to the said land is not indefeasible by reason of fraud of 6D/TP perpetrated through its alter ego David Goh.
>
> *Indefeasibilitv of the title except fraud*
>
> Section 132(1) Sarawak Land Code (Cap 81) provides that:
>
> ... the registered proprietor of any estate or interest to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interest noted on the Register ….
>
> The effect of fraud is provided under s 134(1) Sarawak Land Code which states:
>
> Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void against any person defrauded, thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.
>
> In *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31 a case involving an exchange of lands in Sarawak between two parties, the Federal Court held at p 36 that:

... fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

The Federal Court upheld the High Court decision that the memorandum of transfer was void ab initio for fraud.

At the High Court level, His Lordship George Seah J (as he then was), in a detailed judgment (unreported) on ss 132 and 134(1) of the Sarawak Land Code on the issue of fraud, said:

Fraud is not statutorily defined in the Land Code (Cap 81) but since the Land Code is based primarily on the Torrens System, the Federal Court in *Assets Co Ltd v Mere Roihi* [1905] AC at p 210 has this to say:

... by fraud in these Acts meant actual fraud, ie dishonest of some sort, not what is called constructive or equitable fraud …'

His Lordship further said:

Now, a contract for the sale of land is not a contract uberrimae fidei which there is absolute duty upon each party to make a full disclosure to the other of all material facts within his knowledge (see *Brownlie v Campbell* (1880) 2 App Cas at p 954). But a party who has been induced to enter a contract by a misrepresentation made by the other party may treat the misrepresentation made by other party as a defence to an action for specific performance or as a ground for rescission. A misrepresentation, in order to have legal effect, must be a false statement by one party of some material fact which has induced the other party to enter into the contract.

Since fraud has been proved to the satisfaction of the court, it follows that the purported transfer and registration of the said land in the name of 6D/TP would be void against the first to the fifth defendants, the party defrauded. Section 134(1) provides that 'no person who is a party to the fraud should take any benefit therefrom …'.

[90] On the issue as to whether the plaintiff has acquired beneficial interest in the said land, the learned trial judge ruled as follows:

Even if the plaintiff had completed the project, the plaintiff cannot claim to have the beneficial interest in the whole of the said land. This is because the said agreement is not a contract for sale of land. The court cannot order specific performance of the transfer of the whole said land from the first to the fifth defendants to the plaintiff in any event.

[91] On the issue as to whether the first to the fifth defendants have a right to sell the said land, the learned trial judge ruled as follows:

In the circumstances, the plaintiff has clearly accepted that the first to the fifth defendants are entitled under cl 22 of the said agreement to sell the said land to 6D/TP without the knowledge or consent of the plaintiff. Moreover, the plaintiff

had by his conduct, acquiesced in 6D/TP stepping into the shoes of the first to the fifth defendants for the purpose of carrying out the development of the said land. This is evidenced by the various correspondence between the plaintiff and 6D/TP since 8 June 1993 until 29 September 1993. The plaintiff did not object or complain about the sale of the said land to 6D/TP. See *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor*. In my view, the first to the fifth fefendants are entitled to sell the said land to 6D/TP without the knowledge or consent of the plaintiff, and so I hold.

[92] Consequently the learned trial judge held that the first to the fifth defendants are not liable to the plaintiff for any loss, damages or costs. He said:

> In the circumstances, I hold that the first to the fifth defendants are not liable to the plaintiff for loss, damages and costs as alleged in the plaintiffs re-amended statement of claim over the sale of the said land by the first to the fifth defendants to 6D/TP. The loss, damages and costs incurred by the plaintiff and first to the fifth defendants are clearly caused by the wrongful action of 6D/TP, which breached the said agreement and the second agreement, and as such, I hold that all these loss, damages and costs should be borne solely by 6D/TP.

[93] In conclusion the learned trial judge made the following orders:

(a) as the sale agreement is null and void, he ordered that Bacom deliver to the first to the fifth defendants the issue document of title and quit rent book relating to the said land;

(b) that the memorandum of transfers executed by the first to the fifth defendants are set aside and that the Land & Survey Department and its proper officer do cause the name of Bacom as registered proprietor of the said land be cancelled, and the said land be re-registered in the names of the first to the fifth defendants in equal shares;

(c) that Bacom do pay to the plaintiff the following:

(i) damages for breach of the development agreement and for fraud, to be assessed; and

(ii) costs to be taxed and paid forthwith, with a certificate for two counsel;

(d) that Bacom do pay to the first to the fifth defendants the following:

(i) damages for breach of the sale agreement and for fraud, to be assessed; and

(ii) costs to be taxed and paid forthwith;

(e) that the quantum of damages will be assessed by the deputy registrar;

(f) that the first to the fifth defendants refund the sum of RM1.2m being the purchase price of the said land to Bacom;

(g) that the first to the fifth defendants do specifically perform the development agreement including the granting of a power of attorney to the plaintiff; and

(h) that the counterclaim of Bacom is dismissed with costs.

JUDGMENT OF THIS COURT

[94] The following is a summary of the findings made by the learned trial judge:

(a) Bacom 'had no intention whatsoever to be bound' by the development agreement when it signed the sale agreement;

(b) from the outset, the 'intention and conduct' of Bacom 'were fraudulent within the ambit of s 17(c) and (d) of the Contracts Act 1950' and hence Bacom 'was guilty of civil fraud';

(c) the trial is only on the question of liability of the first to the fifth defendants and Bacom;

(d) the plaintiffs claim that he would be able to complete the works on time was not challenged by either the first to the fifth defendants nor Bacom; it is clear from the evidence of PW2 that the plaintiff was able to complete the works under the development agreement;

(e) Bacom had no intention of honouring the development agreement;

(f) Bacom was bound by the development agreement and hence the revocation of the second power of attorney and the termination or repudiation of the development agreement by Bacom was wrongful;

(g) Bacom is clearly liable to the first to the fifth defendants for indemnity and contribution for all costs and damages to the plaintiffs claim;

(h) the sale agreement and the memorandum of transfers of the said land was procured fraudulently by Bacom and hence 'null and void, and ought to be set aside for fraud';

(i) even if the plaintiff had completed the project, he cannot claim to have beneficial interest in the said land as the development agreement is not a contract for sale of land;

(j) 'the court cannot order specific performance of the transfer of the said land from the first to the fifth defendants to the plaintiff in any event';

(k) the first to the fifth defendants are entitled to sell the said land to Bacom without the knowledge or consent of the plaintiff; and

(l) the first to the fifth defendants are not liable to the plaintiff for any loss, damages or costs.

[95] Premised on the above findings, the learned trial judge made the following orders:

(a) Bacom is to re-transfer the said land to the first to the fifth defendants;

(b) the first to the fifth defendants are to refund the full purchase price to Bacom subject to set-off of damages and costs;

(c) the order that Bacom is to re-transfer the said land to the first to the fifth defendants is to take effect only after settlement by them of the balance of purchase price;

(d) the first to the fifth defendants are to re-execute the first power of attorney in favour of the plaintiff;

(e) the plaintiff is ordered to specifically perform the development agreement and to complete within 18 months from date of re-execution of the first power of attorney and re-approval of the engineering plans, whichever is later and the plaintiff is at liberty to lodge a caveat; and

(f) Bacom's counterclaim is dismissed; and

(g) Bacom is to pay damages for breach of agreement and for fraud and costs to the plaintiff and to the first to the fifth defendants.

THE POSITION OF THE SUIT PRIOR TO AMENDMENT OF PLEADINGS

[96] Thus, the issues between the parties before the plaintiff and the first to the fifth defendants amended their respective pleadings would be as follows:

(a) the plaintiff sought a declaration against the first to the fifth defendants that the revocation of the first power of attorney and the sale of the said land by them is a breach of the development agreement and as such he is entitled to damages; and

(b) the first to the fifth defendants' defence in answer to the plaintiff's claim is that there is no breach of the development agreement as they had a right to sell the said land premissed upon cl 22 of the same; further, the plaintiff was aware and had agreed to the transfer of the said land.

[97] Bacom then became a party to the suit as a consequent of the third party proceedings at the behest of the first to the fifth defendants. In the third party proceedings, the first to the fifth defendants averred as follows:

(a) that the sale of the said land was made with the knowledge and consent of the plaintiff; and

(b) that in the event they are found liable to the plaintiff in the action, they are entitled to a full indemnity against Bacom.

[98] When Bacom was made a party, the plaintiff found it appropriate to make a direct claim against Bacom, namely:

(a) for specific performance of the development agreement or in the alternative damages for breach of the same; and

(b) for damages, viz, for wrongfully inducing the first to the fifth defendants to breach the development agreement, viz, a claim in tort.

[99] In response to the above, Bacom denied the plaintiff's claim on the premiss that there is a lack of privity and denied the tortious allegation.

[100] At the end of the trial the learned trial judge ruled that the first to the fifth defendants were entitled to sell the said land to Bacom without the knowledge or consent of the plaintiff and are not liable to the plaintiff for any loss, damages or costs. Premissed upon these findings, we would be of the view that the plaintiff would not be entitled to the reliefs that he sought, namely, he would not be entitled to the declaration that the revocation of the first power of attorney and the sale of the said land was a breach of the development agreement. It would then follow, by way of reasoning, that there being no liability to the plaintiff for any loss, damages or costs, the third party proceedings against Bacom would have to be dismissed.

[101] The above being the position, we are of the view that consequently, the plaintiff's direct claim against Bacom would suffer the same fate on the doctrine of privity. Bacom is clearly not a party to the development agreement. In this respect, we would unhesitatingly agree with the submission of learned counsel for Bacom that that Bacom has agreed with the first to the fifth defendants that it is bound by the terms of the development agreement is a matter between the two parties and cannot confer contractual privity between the plaintiff and Bacom. The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472–473):

> In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been

crystallised a century ago in *Tweddle v Atkinson (* (1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* ([1915] AC 847).

[102] In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia. In delivering the judgment of the Board, Lord Wilberforce said (at p 174):

> It is true that s 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

[103] Another consequence premissed on what has been discussed earlier would be that the plaintiff's claim against Bacom in tort for damages, viz, for wrongfully inducing the first to the fifth defendants to breach the development agreement would also not be able to stand. The first to the fifth defendants had pleaded that there was no inducement by Bacom in the sale of the said land and the learned judge himself has ruled that there was no breach of the development agreement when the first to the fifth defendants transferred the said land to Bacom.

[104] Premissed upon the pleadings of the plaintiff and the first to the fifth defendants prior to it being amended, the above would be the position of the main action before the court. The amendments to the pleadings made by the plaintiff and the first to the fifth defendants at the close of their respective case, we observed, has confounded the suit.

THE POSITION OF THE MAIN ACTION AFTER THE AMENDMENT OF PLEADINGS

[105] With regard to the first to the fifth defendants, we noted that their amendment to the pleadings turned in an opposite direction of the earlier position taken by them; their amendments were as follows:

(a) that Bacom fraudulently and falsely represented that they would be bound by the terms and conditions of the development agreement knowing the same to be untrue;

(b) that the sale agreement, having been procured by the fraud of Bacom, was null and void and should be rescinded for fraud; and

(c) that the said land should revert back to them.

[106] The plaintiff's amendments, made at around the same time as that of the first to the fifth defendants, were to the following effect:

(a) in relation to the claim in tort for inducing a breach of contract, another particular was added which read as follows:

> Falsely and/or fraudulently representing to the Original Landowners that the 6th Defendant would honour and abide by the said Agreement and the Deed when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.;

and

(b) that if the court should set aside the sale agreement and the memorandum of transfer, for an order of specific performance of the development agreement against the first to the fifth defendants and for the restoration of the first power of attorney and the first caveat; further or in the alternative, damages for breach of the development agreement.

[107] Notwithstanding the amendments discussed above, the learned trial judge ruled that the statement of agreed facts and agreed issues to be tried 'remained the same throughout the entire proceedings' and that 'the trial is only on the question of liability of the first to the fifth defendants and 6D/TP'. We do not think that this is the position after the amendments were made to the pleadings. With respect, such a ruling by the learned trial judge would denote that he had misappreciated the points in controversy after he allowed the amendments. We are of the view that there is a flaw in the conclusion of facts and on the law reached by the trial court, viz, fraud was not an agreed issue to be tried.

[108] The learned trial judge found that from the outset the 'intention and conduct' of Bacom was fraudulent within the ambit of ss 17(c) and (d) of the Contracts Act and was hence guilty of civil fraud. Section 17 of the Contracts Act 1950 reads:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive;.

[109] The plaintiff's claim as amended is that Bacom 'falsely and/or fraudulently' represented to the first to the fifth defendants that it 'would honour and abide' by the development agreement and the deed of variation when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.

[110] Fraud simply means dishonesty or intentional deception and the law is that a charge of fraud, whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on conjecture (see *Narayanan v Official Assignee, Rangoon* AIR 1941 PC 93). In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 Raja Azlan Shah CJ (Malaya) (as he then was) said (at p138):

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, i.e., dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all courts, but such expressions as 'constructive fraud' are … inaccurate;' but 'fraud'... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled. (per *Romilly MR in Green v Nixon (* (1857) 23 Beav 530 & 535; 53 ER 208). Thus in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd (* [1926] AC 101 & 106 it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …'.

[111] That the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt was reiterated in *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229. In delivering the judgment of the Federal Court, Steve Shim CJ (Sabah & Sarawak) said (at pp 234–235):

> In *Saminathan v Pappa* ([1981] 1 MLJ 121), a major issue in dispute was whether there was fraud or misrepresentation involved in the transfer of certain land to the respondent. Therein, the Federal Court held that as the respondent was the registered proprietor of the land, her title was indefeasible and the burden was on the appellant to prove fraud or misrepresentation. The Federal Court held that the appellant had failed to prove the allegation beyond reasonable doubt. The respondent's appeal was therefore allowed. Against that decision, the appellant appealed to the Privy Council. On the issue of fraud. Lord Diplock who delivered the judgment on behalf of the Board (comprising Lord Hailsham, Lord Diplock, Lord Edmund-Davies, Lord Russell and Lord Roskill) said, inter alia:
>
> Their Lordships accordingly now turn to the three findings of fraud on which the learned judge relied as defeating the registered title of Miss Pappa under s 340(2)(a). Only one allegation of fraud was made in *Saminathan*'s pleading viz that Miss Pappa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the collector. The onus of proof of fraud in Malaysia is beyond reasonable doubt. In the circumstances, the Federal Court was clearly entitled, if not bound, to reject, as they did, the judge's finding on the matter. (Emphasis added.)
>
> Clearly therefore, the Privy Council has found it fit to follow the *Atkin Test* concerning the standard of proof for fraud in civil proceedings in Malaysia.

> In the circumstances, the Court of Appeal in the instant case is misconceived in holding that the proper test to establish fraud is on the balance of probabilities. In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v Pappa* that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend. That being the position, the answer to the first question postulated has to be in the negative.

[112] In the instant case, Bacom entered into the sale agreement with the first to the fifth defendants. The plaintiff was not a party to the sale agreement. If at all Bacom was dishonest and had practised deceit when it entered into the sale agreement, the affected party would be the first to the fifth defendants. They were the registered owners of the land then and as ruled by the learned trial judge in his judgment, the plaintiff has no beneficial interest in the said land and that the first to the fifth defendants were entitled to sell the same without the knowledge and consent of the plaintiff. Further, it must be reiterated here that in the third party proceedings, the first to the fifth defendants averred that the sale of the said land was made with the knowledge and consent of the plaintiff. The evidence adduced at the trial also confirmed this.

[113] The plaintiff is not a party to the sale agreement and hence cannot hitch a ride upon it just because there is some provision therein which was intended to benefit him, albeit, as a contractor to build houses and shophouses and the infrastructure that goes with it. As said by Lord Reid in *Scruttons Ltd v Midland Silicones Ltd* it is the general rule 'that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him'.

[114] Further, the plaintiff has not adduced any evidence to show that Bacom had acted dishonestly towards him when it purchased the said land. The burden of proof in tort has been clearly illustrated by the authorities referred to above. This would of course be in line with the doctrine of privity. The doctrine is clear. A non-party cannot bring an action on the contract. A person not a party to a contract cannot enforce or rely for protection on its provisions. The rule of privity relates to who can enforce the contract. The doctrine of privity is clearly illustrated in *Pollock & Mulla on Indian Contract & Specific Relief Acts* (12th Ed), Vol 1 at pp 25-26; it reads:

> *Two aspects of the Doctrine*
>
> The doctrine has two aspects. The first aspect is that no one but the parties to the contract is entitled under it. Contracting parties may confer rights or benefits upon a third party in the form of promise to pay, or to perform a service, or a promise not

to sue (at all or in circumstances covered by an exclusion or limitation clause). But the third party on whom such right or benefit is conferred by contract can neither sue under it nor can rely on defences based on the contract.

The second aspect of the doctrine is that parties to a contract cannot impose liabilities on a third party. A person cannot be subject to the burden of a contract to which he is not a party. It is the counterpart of the proposition that a third party cannot acquire rights under a contract. This rule, for example, also bars a person from being bound by an exemption clause contained in a contract to which it is not a party, so that a contract between A and B cannot impose a liability on C.

Justification for the Doctrine

The rule of privity has been justified on a number of grounds. First, it is unjust to enable a third party to sue on the contract and not be liable for it. Secondly, enabling third parties to enforce contracts would affect or limit the rights of contracting parties to vary or terminate the contract. Thirdly, the third party may not have provided the consideration, and hence should not be able to enforce the contract. Lastly, the promisor is likely to face two actions, from the promisor and the third party.

[115] The plaintiff was clearly not a party to the sale agreement and thus cannot enforce it. We would agree with the finding of the learned trial judge on the facts that the first to the fifth defendants were entitled to sell the said land to Bacom without the consent of the plaintiff. Thus the claim by the plaintiff against the first to the fifth defendants cannot stand at all. There being no liability for damages by the first to the fifth defendants in the main action, the third party proceedings would also have been dismissed. Whatever terms agreed to by Bacom and the first to the fifth defendants, viz, that Bacom is bound by the terms of the development agreement is a matter between them. We would agree with the argument canvassed by learned counsel for Bacom that the sale agreement between the first to the fifth defendants and Bacom cannot confer contractual privity between the plaintiff and Bacom.

[116] The evidence further showed that there was no existence of a novation of the first to the fifth defendants' obligations under the development agreement to Bacom. According to *Osborn's Concise Law Dictionary* (8th Ed) 'novation' means:

> a tripartite agreement whereby a contract between two parties is rescinded in consideration of a new contract being entered into on the same terms as between one of the parties and a third party. … It involves the substitution of one party to a contract by another person, and its effect is to release the obligations of the former party and to impose them on the new party ….

The plaintiff's claim for damages against the first to the fifth defendants and Bacom cannot at all surface. It would tantamount to a claim premised on a novation when no such tripartite agreement was entered into between all the parties to the proceedings.

[117] There being no evidence of deceit practised on the plaintiff by Bacom, we cannot fathom the claim in tort by the plaintiff against Bacom. There is no evidence that Bacom interfered with the development agreement. Bacom never persuaded the first to the fifth defendants to breach the development agreement. The plaintiff insisted that Bacom entered into the sale agreement for the purpose of developing a theme/water park. He incessantly pursued this line of attack based on Bacom's letter dated 22 June 1993, referred to earlier, addressed to the Land & Survey Department wherein it intimated that it is desirous of converting for commercial use the said land and two other pieces of land adjacent to the said land which at that material time was not even owned by Bacom. We noted that that letter was nothing more than a 'damp squib'. Further, there is no evidence to show that the Land & Survey Department responded to that letter neither would we place any importance to that letter because it is not even a formal application for conversion of the said land as such. The learned trial judge seems to be of the view that that letter 'is clear and unequivocal proof of fraudulent intention of Bacom and David Goh not to honour the development agreement'. At the trial David Goh testified that the idea of developing a water theme park was 'dropped long ago'. There is also no evidence to show that Bacom had pursued the matter of converting the said land for commercial use neither have the court been enlightened as to whether Bacom became the owner of the other two adjacent pieces of land which, it seems, would be needed for the development of the water theme park. We noted that the learned judge seems to have ignored this part of the evidence.

[118] The sale agreement was dated 25 May 1993 and acting upon the terms therein, Bacom granted a power of attorney, ie, the said second power of attorney to the plaintiff which was registered on 27 May 1993 which is the date when Bacom also became the registered owner of the said land. We are of the view if at all Bacom was dishonest about the whole thing and was not interested in honouring what was agreed to under the development agreement, it would not have granted the second power of attorney two days after the execution of the sale agreement.

[119] What the evidence showed was that the engineering plan was only approved on 2 April 1994. The plaintiff is supposed to complete the works that it undertook to carry out under the development agreement by 22 October 1994. Bacom revoked the second power of attorney on 30 April 1994 and by letter dated 14 May 1994 requested the plaintiff to vacate the said land. The evidence showed that at that material time the works to be carried out by the plaintiff has yet to commence. Literally speaking, not a single brick has been laid. It is Bacom's case that at that material time the said land has been filled with construction waste from some other building site. That being the state of affairs at the material time, a question arising would be whether the plaintiff would be able to complete the project on time, the target date being 22

October 1994. In relation to this, the learned trial judge, who seem to have placed some importance to this issue, noted that the plaintiffs claim that he would be able to complete the works on time was not challenged by the first to the fifth defendants nor Bacom. He then ruled that the revocation of the second power of attorney and the termination or repudiation of the development agreement by Bacom was wrongful for, inter alia, failure to give three months notice pursuant to the development agreement specifying the breach or breaches to be remedied.

[120] With respect to the learned trial judge, we would say that he has misappreciated the facts and misapplied the law in ruling as such. We are of the view that he had disregarded and misappreciated Bacom's case without resorting to evidence adduced by witnesses called by Bacom, namely, Chen Chi Yong (6DW3), Kua Jak Loi (6DW6) and Professor Bujang bin Kim Huat (6DW7). They are independent witnesses. Their evidence seem to suggest that the plaintiff would not be able to complete the project within the time contemplated. It is not disputed that the engineering plan for developing the said land submitted by the plaintiff was approved by the Land & Survey Department only on 2 April 1994. According to Chen Chi Yong (6DW3), the Head of the engineering department in KRDC, the following steps will then have to be adhered to by the developer, viz, the plaintiff after the engineering plans has been approved:

(a) the developer has to submit a notice for the commencement of the engineering work to the KRDC and that it would take about two weeks to obtain the approval;

(b) after the approval of the above notice, the developer can then commence the engineering works on site;

(c) the developer then has to submit a building plan for approval by the KRDC and before approval of the building plan, no building construction can commence; on an average, the KDRC would take five to six months to approve a building plan;

(d) in order for the developer to obtain an occupation permit, he must complete the infrastructure work; it takes about three to four weeks to approve an occupation permit.

[121] In his evidence, Kua Jak Loi (6DW6), an engineer with the KRDC testified that the engineering plan for development of the said land was approved by the Land & Survey Department on 2 April 1994 but KRDC never received any building plan from the developer; in other words, there was no record of any building plan submitted to the KRDC by the developer, ie, the plaintiff. Professor Bujang bin Kim Huat (6DW7), who carried out a test on the said land to determine the type of land fill material found that the ground

was not levelled, the fill was not properly made and that construction waste was used to fill the said land. He concluded that the fill was 'not being carried out to the standard specification of JKR', ie, the Public Works Department.

[122] The evidence discussed aforesaid would denote that the plaintiff as developer had not even commenced work on the said land. These facts would seem to denote the reason why the plaintiff was reluctant to give a progress report to Bacom notwithstanding that he was then armed with the second power of attorney. The facts would also denote that the plaintiff would not be able to complete the development within the time frame as provided for in the development agreement.

[123] It is our unanimous view that the claim in tort by the plaintiff cannot be sustained as there is no evidence to show that Bacom, without lawful justification, had intentionally interfered with the development agreement by persuading the first to the fifth defendants to breach the same. The learned trial judge had ruled that no breach was involved in the transfer of the said land and that the first to the fifth defendants were entitled as of right to make the transfer. After all it was the evidence of the first to the fifth defendants that the plaintiff had agreed and acquiesced in the transfer of the said land prior to the amendments made to their pleadings wherein they took an opposite position. Having ruled as such, the claim by the first to the fifth defendants against Bacom as amended, viz, that Bacom fraudulently and falsely represented that they would be bound by the terms and conditions of the development agreement, knowing the same to be untrue surely cannot stand at all.

[124] We are of the view that the learned trial judge fell into error in ruling that the sale agreement is null and void and is rescinded for fraud. No fraud has been proven against Bacom, That being the position, we would hold that the order of the learned trial judge that the said land is to revert back to the first to the fifth defendants cannot stand at all. The first to the fifth defendants have not shown that they were deceived by Bacom. They sold the said land for RM1.2m. It is the plaintiff who has to develop the said land and not Bacom. The plaintiff has yet to fulfil his side of the bargain under the development agreement and under the circumstances has no cause of action against Bacom.

[125] It is clear that the first to the fith defendants' amended statement of claim in the third party proceedings asserted the opposite of their position in the original claim in the third party proceedings and their unamended defence in the main action. The plaintiff then decided to hitch a ride onto the apparently winning side by amending his statement of claim in the main action to allege fraud against Bacom when the facts showed that no deceit was practised on him by Bacom. The facts showed he refused to cooperate with Bacom. What was revealed in evidence, namely, the letter from his solicitors

dated 12 June 1993, reproduced earlier, is that he was more interested in selling the project envisaged by the development agreement to Bacom for RM2.1m and had enquired whether the latter was prepared to formalise the contractual relation by entering into a novation agreement. Is that reflective of fraud? We do not think so. To show there was fraud, the plaintiff has to prove that Bacom has been guilty of a deliberate wrong by inducing him to act to his detriment. He has failed to do so.

[126] Under these circumstances, surely the court cannot order that the sale agreement and the respective memorandum of transfers be set aside and consequently order specific performance of the development agreement against the first to the fifth defendants and for the restoration of the first power of attorney and the first caveat.

[127] Before we make our decision of the main action, we would have to deal with the multifarious and intricate position of the three interlocutory appeals discussed earlier.

[128] The first appeal is with regards to Bacom's application to recall the witnesses called by the plaintiff and the first to the fifth defendants following the filing of the amended pleadings. The application was opposed by the plaintiff and the first to the fifth defendants. The learned trial judge did not decide upon the application immediately but ordered Bacom to proceed with its case. He only made his ruling after Bacom had completed its case, viz, he dismissed the application. As much as good sense dictates, we would have thought that the application should have been allowed as the amended pleadings had taken an opposite position compared with earlier pleadings, namely, fraud has now become an issue. The earlier issues as agreed to by the parties would have now gone off on a tangent and Bacom is now confronted with a new case. Further, we cannot fathom why the plaintiff and the first to the fifth defendants opposed the application. There was no danger of any prejudice to them. We would agree with the submission of learned counsel for Bacom that the learned trial judge ought not to have deferred his decision until the end of the trial but ought to have made a prompt decision on the application.

[129] Bacom appealed against that decision and it is now before us. It has now become a perplexing matter. The learned trial judge has delivered his decision on the main action premised on the amended pleadings. If this appeal is allowed, it would seem that a retrial has to be ordered which, we think, would be unfavourable to all parties under the circumstances.

[130] The second appeal is in relation to an affidavit dated 4 September 1998 filed by Bacom's David Goh in support of its application to recall the plaintiff for further cross-examination. In that affidavit, David Goh referred to

the huge discrepancy between the plaintiff's claim to have expended RM1m for works carried out under the development agreement and the plaintiff's trading firm accounts for the years 1992, 1993 and 1994 which showed an expenditure of only RM141,860.60. Bacom contended that this discrepancy would be relevant both on the liability issue and also later at the damages stage since the extent of work actually carried out on the development project by the plaintiff is an issue. Without regard to that, on 6 November 1998 the plaintiff moved the court to have that part of the affidavit expunged and struck out from the court's record on the grounds, inter alia, that the affidavit does not disclose the source of information and that his trading firm's tax file is classified material under s 138 of the Income Tax Act.

[131] The third appeal concerns the learned trial judge's ruling at the end of Bacom's case, viz, that Bacom was not allowed to call three more expert witnesses, ie, an architect, a quantity surveyor and a valuer. Counsel for Bacom pointed out that this evidence is of particular relevance to the question of whether there was any prospect of the plaintiff being able to complete the work in the time available and to challenge the plaintiff's assertion that he would be able to complete in time and also to show the amount of work actually done by the plaintiff. The learned trial judge dismissed the application on the grounds, inter alia, that there is more than ample evidence before the court and the calling of these proposed witnesses would unnecessarily lengthen the trial.

[132] Thus, at the end of the day, we now have a situation where the learned trial judge made his decision on the evidence adduced before him in the course of the trial without waiting for the three interlocutory appeals to be heard and disposed of by the appellate court. To alleviate us of this intricate situation, we are of the view that under the circumstances of the case as condensed, premised on the amended pleadings and the evidence as it is, it is imperative for this court to review the findings made by the learned trial judge vis-a-vis the issues agreed to between the parties at the outset of the trial. Our views are as follows:

(a) as to whether the plaintiff has a caveatable interest in the said land when he lodged the first caveat is now a non-issue as that caveat was withdrawn prior to the execution of the sale agreement;

(b) in relation to the second caveat, we find that the plaintiff has no caveatable interest; he was not a party to the sale agreement and hence has no enforceable contractual right against Bacom to justify the lodgment of the second caveat;

(c) the first to the fifth defendants and later Bacom as registered proprietors of the said land are not bare trustees under the development agreement read together with the first and second power of attorney;

(d) we would agree with the finding of the learned trial judge that the first to the fifth defendants as original landowners have the right to sell the said land to Bacom without the knowledge or consent of the plaintiff; it must be noted that the plaintiff has not appealed against this finding which would denote that he has approbated the sale; thus, the first to the fifth defendants are not in breach of the development agreement when they entered into the sale agreement; further, the evidence showed that the plaintiff knew that the first to the fifth defendants were selling the said land to Bacom;

(e) the plaintiff has no right of action against Bacom to enforce the terms of the development agreement as there is no contractual nexus; it follows that the plaintiff is not entitled to specific performance of the development agreement against Bacom;

(f) Bacom was justified in revoking the second power of attorney and consequently in requesting the plaintiff to vacate the said land premised on the evidence that at that material time, ie, between 30 April 1994 and 14 May 1994, the works to be carried out by the plaintiff has yet to commence; although the engineering plan for developing the said land was approved on 2 April 1994, the plaintiff has yet to submit to the KRDC the notice for the commencement of the engineering works which would also require the approval of the KDRC before the work can commence; further to that, the plaintiff would then have to submit a building plan which would take, according to the evidence, between five to six months for the KRDC's approval; the evidence showed that no building plan was ever submitted to the KDRC; and

(g) the first to the fifth defendants are not entitled to claim any indemnity under the third party action against Bacom as there is nothing for Bacom to indemnify.

[133] On the issue of fraud, we have ruled earlier that the plaintiff and also the first to the fifth defendants have failed to prove that they were deceived by Bacom. In relation to this, we are of the view that the learned trial judge also erred in ruling that fraud can be proved on a balance of probabilities.

[134] Since we have decided that the plaintiff has no direct claim on Bacom on the grounds of lack of privity of contract, we would rule that Bacom should succeed in its counterclaim. Under the circumstances of this case we are of the view that Bacom is entitled to the relief sought against the plaintiff, viz, the removal of the second caveat and also damages and costs. As there is clearly no privity of contract between them the issue of caveatable interest does not arise at all. We would order that damages be assessed by the learned senior assistant registrar and that the costs be taxed.

[135] In conclusion, we would say that we find it difficult, if not impossible, to affirm the judgment of the learned trial judge. There were errors of law and a manifest misappreciation of the facts. We are of the view that the learned trial judge rather appreciated the matter from a different perspective resulting in misappreciation of the points in controversy. The result is that the fourth appeal which relates to the main action must be allowed with costs to be paid by the plaintiff and the first to the fifth defendants to Bacom. We also order that the deposit be refunded to Bacom. The judgment and all orders of the learned trial judge are hereby accordingly set aside.

[136] With regard to the first appeal, we would have thought that it would have been a matter of course for the court to allow an application to recall a witness or witnesses when pleadings are amended in the midst of a trial. It can of course be argued that the trial judge has a discretion in applications of this nature. We would think that a similar argument would also be canvassed in relation to the second and third appeals. Looking at the facts and the surrounding features and course of events in the instant case, we are of the view that these appeals would abate. They are now academic in view of our decision in the main appeal. We are of the view that this ruling that the first, second and third appeals abate under the circumstances of this case would better serve the ends of justice and to place everything in proper perspective. As such we would order that the deposits for these three appeals be refunded to Bacom. There is no issue of costs for these three appeals as they have not been adjudicated upon.

Appeal allowed against main action with costs to be paid by plaintiff to first to fifth defendants and Bacom.

Reported by Kohila Nesan